

Marquette Intellectual Property Law Review

Volume 15 | Issue 1

Article 3

Emerging Scholars Series: A Sui Generis Regime for Traditional Knowledge: The Cultural Divide in Intellectual Property Law

J. Janewa OseiTutu

University of Pittsburgh School of Law

Follow this and additional works at: <http://scholarship.law.marquette.edu/iplr>



Part of the [Intellectual Property Commons](#)

Repository Citation

J. Janewa OseiTutu, *Emerging Scholars Series: A Sui Generis Regime for Traditional Knowledge: The Cultural Divide in Intellectual Property Law*, 15 Intellectual Property L. Rev. 147 (2011).

Available at: <http://scholarship.law.marquette.edu/iplr/vol15/iss1/3>

This Article is brought to you for free and open access by the Journals at Marquette Law Scholarly Commons. It has been accepted for inclusion in Marquette Intellectual Property Law Review by an authorized administrator of Marquette Law Scholarly Commons. For more information, please contact megan.obrien@marquette.edu.

EMERGING SCHOLARS SERIES*

A SUI GENERIS REGIME FOR TRADITIONAL KNOWLEDGE: THE CULTURAL DIVIDE IN INTELLECTUAL PROPERTY LAW

J. JANEWA OSEITUTU**

ABSTRACT	149
INTRODUCTION	150
I. THE TRADITIONAL KNOWLEDGE QUESTION	158
A. <i>The Backlash against TRIPS</i>	158
B. <i>What Is Traditional Knowledge?</i>	161
C. <i>The Existing Legal Framework, Biopiracy and Traditional Knowledge</i>	164
D. <i>Creating New Categories of Intellectual Property</i>	169
E. <i>Reaching Agreement on an International Legal Instrument to Protect Traditional Knowledge</i>	171
II. JUSTIFYING INTANGIBLE PROPERTY RIGHTS.....	174
A. <i>Classic Approaches to Intellectual Property Law</i>	174
B. <i>An Instrumentalist Approach</i>	175
1. <i>The International Treaties Support a Balanced Approach</i>	177
III. A TRADITIONAL KNOWLEDGE RIGHT.....	180

* The *Marquette Intellectual Property Law Review* Emerging Scholars Series highlights the work of the junior scholars who are poised to become the leading intellectual property thinkers of the next generation.

** B.A. (University of Toronto), J.D. (Queen's University), LL.M. (McGill University); Visiting Assistant Professor of Law, University of Pittsburgh School of Law. E-mail: janewa.oseitutu@alumni.utoronto.ca. I would like to thank Marina Angel, Olufunmilayo B. Arewa, Anahita Ariya-Far, Robert A. Bohrer, Irene Calboli, Margaret Chon, Ellen Goodman, Charles C. Jalloh, Kaisa McCandless, Chidi Oguamanam, Lisa P. Ramsey, Geoffrey Scott, Peter K. Yu, the participants of the Drake 2010 Intellectual Property Scholars Roundtable, and the participants of the Temple University Beasley School of Law Update for Feminist Law Professors for their valuable feedback and suggestions for the paper. Ms. Elizabeth Youngkin and Ms. Patrice Collins provided able research assistance. The views expressed herein do not represent the views of any organization with which I am, or have been, associated. All opinions, errors and omissions are my own.

A. <i>The Objectives of Traditional Knowledge Protection</i>	180
1. Commonality between the Policy Objectives of Intellectual Property and Traditional Knowledge	181
a. <i>Exclusion</i>	181
b. <i>Economic Rationale</i>	181
c. <i>Innovation</i>	184
2. Equity-Oriented Goals as a Major Distinction	185
a. <i>Protecting Cultural Heritage</i>	187
b. <i>Promoting Value and Respect</i>	188
B. <i>Traditional Knowledge Challenges</i>	190
1. The Public Domain as a Eurocentric Concept	190
2. Perpetual Protection	192
3. Identifying the Traditional or Indigenous Traditional Knowledge Producing Community	193
C. <i>Other Intergenerational Knowledge Goods</i>	198
1. Cultural Exchange	198
2. Vinegar and Silver as Examples	199
IV. ADDRESSING THE PROBLEM	202
A. <i>The Need for a Balanced System</i>	202
1. Beyond the North-South Framework	204
2. A Question of Justice	206
B. <i>Intellectual Property Related Solutions that Don't Require an Expansion of the Existing Regime</i>	209
1. Accounting for Diverse Circumstances	209
2. Mediation	211
3. Capacity Building	212
4. Education	212
5. National Measures	213
CONCLUSION	213

ABSTRACT

Traditional knowledge can be protected, to some extent, under various intellectual property laws. However, for the most part, there is no effective international legal protection for this subject matter. This has led to proposals for a *sui generis* regime to protect traditional knowledge. The precise contours of the right are yet to be determined, but a *sui generis* right could include perpetual protection. It could also result in protection for historical communal works and for knowledge that may be useful but that is not inventive according to the standards of intellectual property law. Developing countries have been more supportive of an international traditional knowledge right than developed countries. At the same time, developing countries have been critical of the impact of intellectual property rights on social issues such as access to medicines and access to educational materials. In light of developing country concerns about the negative effects of strong global intellectual property rights, this paper uses a development-focused, instrumentalist approach to assess the implications of a *sui generis* traditional knowledge right. It concludes that some of the measures sought may not achieve the desired outcome. Although intellectual property can play a role in protecting traditional knowledge, a *sui generis* intellectual property style right may hinder the equity-oriented goals of some traditional knowledge communities.

INTRODUCTION

Some communities possess useful knowledge and traditions that have been passed down from one generation to another. These traditional practices and artworks, or the medicinal knowledge may be highly valued by the community, and possibly by others. However, intellectual property law does not necessarily protect knowledge relating to the medicinal uses of plants, reproductions of communal works, traditional cultural practices, or spiritual rituals. This is because much of this knowledge is not new or cannot be identified as having been created by a particular individual.¹

Far from protecting this knowledge, intellectual property law may, in some instances, have facilitated the taking and commercialization of this traditional knowledge by individuals or entities that are external to the traditional knowledge-generating community. The result is often an inequitable situation in which the knowledge is used, including for commercial purposes, without attribution or compensation to the knowledge-generating community. This use or taking without consent or compensation has been characterized as “bio-piracy” or “misappropriation.”² The taking and use (or misuse) of the cultural works, genetic resources and knowledge of traditional and indigenous peoples, has led to a call to protect traditional knowledge and traditional cultural expressions.³ This includes the possibility of

1. The various forms of traditional knowledge may implicate different kinds of intellectual property. For example, patent law relates to medicinal traditional knowledge, whereas artistic and cultural practices relate to copyright law, and identifying symbols may pertain to trademarks and geographical indications. Copyright Act of 1976, 17 U.S.C. § 102(a) (2006) (provides that copyright subsists “in original works of authorship fixed in any tangible medium of expression.”). Patent Act of 1952, 35 U.S.C. § 101 (2006) (this general patentability provision states that only one who “invents or discovers” an invention that is “new and useful” may obtain a patent).

2. See, e.g., Srividhya Ragavan, *Protection of Traditional Knowledge*, 2 MINN. INTELL. PROP. REV. 1 (2001); Lorna Dwyer, *Biopiracy, Trade and Sustainable Development*, 19 COLO. J. INT’L ENVTL. L. & POL’Y 219 (2008).

3. In the World Intellectual Property Organization (WIPO) context, traditional cultural expressions can be considered a subset of traditional knowledge. Traditional knowledge and traditional cultural expressions are often seen as part of a single “integrated heritage.” However, due to the specific legal and policy questions raised by traditional cultural expressions in the intellectual property context, WIPO has separate, but parallel, work programs for traditional knowledge and traditional cultural expressions. See *Traditional Cultural Expressions (Folklore)*, WIPO, <http://www.wipo.int/tk/en/folklore/> (last visited Sept. 22, 2010). This paper considers intellectual property as a broad category, despite the many distinctions between patent law, copyright law, and trademark law. The focus of this work is on the underlying similarities that inform intellectual property law and policy. As such, reference to traditional knowledge will be used as a broad category that may include traditional cultural expressions. Such grouping is not inconsistent with the concept of traditional knowledge and traditional cultural expressions, and some early documents from

legislation to create a *sui generis* traditional knowledge right.

Focusing on the issue of equity,⁴ this article uses an instrumentalist approach to query whether a new intangible property right that is based on an intellectual property model is likely to meet some of the distributive justice goals of traditional knowledge holders and developing countries. Part of the subtext of the traditional knowledge narrative is about the effects of the history of colonialism. With respect to the intersection between traditional knowledge and intellectual property law, it becomes a discussion about equity, fairness, and what is perceived to be a Eurocentric international intellectual property system that favors Western methods of knowledge creation.⁵

One of the substantial critiques of international intellectual property law and the World Trade Organization (“WTO”) *Agreement on Trade-Related Intellectual Property Rights* (“TRIPS”)⁶ has been its impact on access to affordable knowledge goods. I suggest that it is useful, therefore, to assess the potential distributive justice effects of a new intangible property right before it is created. With the goal of access to affordable knowledge goods in mind, I explore whether a *sui generis* traditional knowledge right, which may include perpetual protection, advances this goal. I start from the premise that knowledge is a public good and that access to knowledge goods is in the public interest. Intellectual property protected goods should therefore be affordable

the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Tradition Knowledge and Folklore (IGC) have even defined traditional cultural expressions as a subset of traditional knowledge. See WIPO IGC, MATTERS CONCERNING INTELLECTUAL PROPERTY AND GENETIC RESOURCES, TRADITIONAL KNOWLEDGE AND FOLKLORE—AN OVERVIEW ¶ 30, WIPO Doc. WIPO/GRTKF/IC/1/3 (2001).

4. I use the term “equity” in the ordinary sense of the word, meaning that which is fair and just, or appropriate in the circumstances. See Concise Oxford Dictionary (10th ed. 1999). Naturally, what is considered “fair” may depend on one’s perspective.

5. The traditional knowledge dialogue has also been described as a discussion about “value.” See Olufunmilayo B. Arewa, *Piracy, Biopiracy and Borrowing: Culture, Cultural Heritage and the Globalization of Intellectual Property* 56 (Case Res. Paper Series in Legal Stud., Working Paper No. 04–19, 2006) available at <http://ssrn.com/abstract=56921> (“This same combination of derogation and appropriation or borrowing without compensation from local knowledge have been important motivating forces behind contemporary efforts to protect local knowledge. The development of rationales from protecting local knowledge has in turn entailed constructing arguments to justify the worthiness of such knowledge for intellectual property protection. This is essentially a discourse about value.”); Rosemary J. Coombe, *The Properties of Culture and the Politics of Possessing Identity: Native Claims in the Cultural Appropriation Controversy*, in AFTER IDENTITY 254–255 (Dan Danielson and Karen Engle eds., 1995) (arguing that Natives need to tell Native stories and that the law is based on European culture, which is no longer acceptable in a post-colonial era).

6. Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994) [hereinafter TRIPS Agreement].

and accessible. Moreover, access to affordable knowledge goods is a laudable and worthwhile development goal, and one which the various forms of intellectual property should support.⁷

The goal of access to affordable knowledge goods is relevant to the traditional knowledge discussion because developing countries are the primary advocates of traditional knowledge at the World Intellectual Property Organization (“WIPO”). Furthermore, their concerns about the TRIPS can be described as largely related to the effect of intellectual property rights on access to affordable knowledge goods.⁸ Patents and copyright, in particular, have been criticized on this basis.⁹ It is not a stretch to state, as a general proposition, that intellectual property generating countries have benefitted from TRIPS far more than developing countries.¹⁰ Further, the misappropriation allegations made by developing countries and indigenous peoples appear to be valid and well-documented.¹¹ There are clearly some problems with the

7. See Mary W.S. Wong, *Toward an Alternative Normative Framework for Copyright: From Private Property to Human Rights*, 26 CARDOZO ARTS & ENT. L.J. 775, 830–32 (2009); Margaret Chon, *Intellectual Property and the Development Divide*, 27 CARDOZO L. REV. 2821, 2885, 2891 (2006).

8. See, e.g., WIPO, AFRICAN GROUP SUBMISSION ON DOCUMENT WIPO/GRTKF/IC/13/9, WIPO Doc. WIPO/GRTKF/14/9 (2009). This can include, among others, educational or artistic works that are subject to copyright or pharmaceutical products that are subject to patent protection.

9. Joseph Straus, *The Impact of the New World Order on Economic Development: The Role of Intellectual Property Rights System*, 6 J. MARSHALL REV. INTELL. PROP. L. 1 (2006) (“[I]n 1994, TRIPs was at the center of multifaceted criticism, for both developing and developed countries.”); see Keith E. Maskus & Jerome H. Reichman, *The Globalization of Private Knowledge Goods and the Privatization of Global Public Goods*, 7 J. INT’L ECON. L. 279, 286 (2004) (“[S]erious questions arise as to the sustainability of the attempt in TRIPs to resolve the international externality aspects of protecting new knowledge goods. An additional criticism leveled at the emerging IPR system is that the agenda for increasing protection has been articulated and pushed by rich-country governments effectively representing the commercial interests of a limited set of industries that distribute knowledge goods.”); Sisule F. Musungu & Graham Dutfield, *Multilateral Agreements and a TRIPs-plus World: The World Intellectual Property Organisation (WIPO)* 3 (2003), available at [http://www.geneva.quino.info/pdf/WIPO\(A4\)final0304.pdf](http://www.geneva.quino.info/pdf/WIPO(A4)final0304.pdf) (noting that the appropriateness of the standards contained in the TRIPs Agreement for developing countries has been seriously questioned, and that the TRIPs standards may be too high for these countries); see James Boyle, *A Manifesto on WIPO and the Future of Intellectual Property*, 2004 DUKE L. & TECH. REV. 0009 (2004) (critiquing TRIPs).

10. Marie Byström & Peter Einarsson, *TRIPs: Consequences for Developing Countries Implications for Swedish Development Cooperation* 48–49 (2001) (consultancy report to the Swedish International Development Cooperation Agency (SIDA)).

11. See, e.g., Srividhya Ragavan, *Protection of Traditional Knowledge*, 2 MINN. INTELL. PROP. REV. 1, 10–12, 47–50 (2001) (explaining documented cases, included the well-known controversy over the patenting of “neem,” long used in Indian villages as a traditional medicine, and outlining some of the jurisprudence involving Australian Aboriginal artists); Lorna Dwyer, *Biopiracy, Trade and Sustainable Development*, 19 COLO. J. INT’L ENVTL. L. &

current intellectual property structure.

The traditional knowledge dialogue has advanced to a stage where there is growing recognition of the need to value and acknowledge the contributions of indigenous and local communities.¹² There is an attempt to maximize the benefits of traditional knowledge for these communities while minimizing the harmful effects of misappropriation.¹³ As part of this effort, there have been various studies on the protection of traditional knowledge, and there is a wealth of valuable scholarship on the relationship between traditional knowledge and intellectual property.¹⁴ Numerous scholars have concluded that traditional

POL'Y 219, 226–31 (2008) (explaining the controversy over the Rosy Periwinkle, the Neem tree, the Enola Bean and others).

12. See, e.g., Daniel Gervais, *The Internationalization of Intellectual Property: New Challenges from the Very Old and the Very New*, 12 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 929 (Spring 2002); Graham Dutfield, *TRIPS Related Aspects of Traditional Knowledge*, 33 CASE W. RES. J. INT'L L. 233, 248–61 (Spring 2001); Srividhya Ragavan, *Protection of Traditional Knowledge*, 2 MINN. INTELL. PROP. REV. 1 (2001); See generally MICHAEL F. BROWN, WHO OWNS NATIVE CULTURE (2003).

13. See WIPO IGC, THE PROTECTION OF HUMAN KNOWLEDGE: REVISED OBJECTIVES AND PRINCIPLES, WIPO Doc. WIPO/GRTKF/IC/16/5 (2010) (Providing provisions against misappropriation and enhancing benefit sharing. See Art. 1 and Art. 2 for rules for provisions against misappropriation and unfair competition. See Art. 6 on benefit sharing, Art. 9 on duration of protection, and Art. 13 for enforcement of traditional knowledge protection).

14. See, e.g., Srividhya Ragavan, *Protection of Traditional Knowledge*, 2 MINN. INTELL. PROP. REV. 1, 10–14, 47–52 (2001); Lorna Dwyer, *Biopiracy, Trade, and Sustainable Development*, 19 COLO. J. INT'L ENVTL. L. & POL'Y 219 (2008); Graham Dutfield, *TRIPS Related Aspects of Traditional Knowledge*, 33 CASE W. RES. J. INT'L L. 233 (Spring 2001); Christine H. Farley, *Protecting Folklore of Indigenous Peoples: Is Intellectual Property the Answer?* 30 CONN. L. REV. 1 (1997); Paul Kuruk, *Goaded a Reluctant Dinosaur: Mutual Recognition Agreements as a Policy Response to the Misappropriation of Foreign Traditional Knowledge in the United States*, 34 PEPP. L. REV. 629 (2007); Stephen R. Munzer & Kal Raustiala, *The Uneasy Case for Intellectual Property Rights in Traditional Knowledge*, 27 CARD. ARTS & ENT. L.J. 37 (2009); David Castle & E. Richard Gold, *Traditional Knowledge and Benefit Sharing: From Compensation to Transaction*, in ACCESSING AND SHARING THE BENEFITS OF THE GENOMICS REVOLUTION 65 (Peter W.B. Phillips & Chika B. Onwuekwwe eds., 2007); Olufunmilayo B. Arewa, *TRIPS and Traditional Knowledge: Local Communities, Local Knowledge, and Global Intellectual Property Frameworks*, 10 MARQ. INTELL. PROP. L. REV. 155 (2006); CHIDI OGUAMANAM, INTERNATIONAL LAW AND INDIGENOUS KNOWLEDGE: INTELLECTUAL PROPERTY, PLANT BIODIVERSITY, AND TRADITIONAL MEDICINE 52–57 (2006); Chidi Oguamanam, *Localizing Intellectual Property in the Globalization Epoch: The Integration of Indigenous Knowledge*, 11 IND. J. GLOBAL LEGAL STUD. 135 (2004); Chidi Oguamanam, *Local Knowledge as Trapped Knowledge: Intellectual Property, Culture, Power and Politics*, 11 J. WORLD INTELL. PROP. 29 (2008); Paul Kuruk, *The Role of Customary Law Under Sui Generis Frameworks of Intellectual Property Rights in Traditional and Indigenous Knowledge*, 17 IND. INT'L & COMP. L. REV. 67 (2007); Peter K. Yu, *World Trade, Intellectual Property and the Global Élités: An Introduction*, 10 CARDOZO J. INT'L & COMP. L. 1 (2002).

knowledge can be only partially protected under the existing system.¹⁵ Others have queried whether it should be treated as property at all.¹⁶

The question that remains is how best to address the concerns of traditional knowledge generating communities. Yet, the traditional knowledge right that some developing countries and traditional knowledge proponents support is based on an intellectual property model, and therefore, has the potential to produce problems not unlike those which have resulted under the current system. An international *sui generis* intellectual property right for traditional knowledge may hinder access to affordable knowledge goods, including for indigenous and local communities.

Drawing on the notion of intellectual property ‘from below,’¹⁷ this paper aims to contribute to the discussion by evaluating the utility of an intellectual property model for the protection of traditional knowledge. This assessment is done in light of some of the stated goals of traditional knowledge protection,¹⁸ and with a view to the potential impact of proprietary traditional knowledge on affordable knowledge goods.¹⁹ The creation of a new property right may serve as both an offensive and defensive measure. This article cautions that a legally binding instrument that creates an exclusive proprietary traditional knowledge right may not ultimately benefit indigenous and local communities.

While it is not entirely clear what an international legal instrument

15. See Daniel J. Gervais, *The Internationalization of Intellectual Property: New Challenges from the Very Old and the Very New*, 12 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 929 (Spring 2002); Graham Dutfield, *TRIPS-Related Aspects of Traditional Knowledge*, 33 CASE W. RES. J. INT’L L. 233, 248–61 (Spring 2001); Srividhya Ragavan, *Protection of Traditional Knowledge*, 2 MINN. INTELL. PROP. REV. 1 (2001); Christine H. Farley, *Protecting Folklore of Indigenous Peoples: Is Intellectual Property the Answer?* 30 CONN. L. REV. 1 (1997) (discussing litigation over the use of Navajo cultural works in Australia); Paul Kuruk, *Goaded a Reluctant Dinosaur: Mutual Recognition Agreements as a Policy Response to the Misappropriation of Foreign Traditional Knowledge in the United States*, 34 PEPP. L. REV. 629 (2007).

16. Stephen R. Munzer & Kal Raustiala, *The Uneasy Case for Intellectual Property Rights in Traditional Knowledge*, 27 CARD. ARTS & ENT. L.J. 37 (2009).

17. I draw on the intellectual property ‘from below’ approach as outlined by Professor Margaret Chon. The concept of viewing international law ‘from below’ can be attributed to Balakrishnan Rajagopal’s seminal work, *INTERNATIONAL LAW FROM BELOW: DEVELOPMENT, SOCIAL MOVEMENTS AND THIRD WORLD RESISTANCE* (2003).

18. See WIPO IGC, *THE PROTECTION OF TRADITIONAL KNOWLEDGE: REVISED OBJECTIVES AND PRINCIPLES*, WIPO Doc. WIPO/GRTKF/IC/16/5 (2010).

19. There is a variety of perspectives from which one can evaluate traditional knowledge, including an economic, anthropological or human rights lenses. Although I touch on these issues in this article, I do not purport to provide an economic analysis of the propriety of protecting traditional knowledge, nor do I pursue a detailed analysis of the issue of traditional knowledge through the lens of human rights law.

to protect traditional knowledge might look like, a *sui generis* regime to protect such knowledge has been proposed.²⁰ This is because this subject matter does not easily fit within the existing categories of intellectual property. A *sui generis* regime could result in a new intangible property right that will exclude anyone other than the rights holders from making use of this intergenerational knowledge without consent. Possible characteristics of a traditional knowledge right include perpetual protection, protection of historical communal cultural works, and protection of knowledge that may be useful but that is not be inventive or creative according to the standards of intellectual property law.²¹

In my view, there are two main difficulties of traditional knowledge that render the benefits of a *sui generis* intellectual property style traditional knowledge right questionable. First, the absence of clear consensus about the meaning of the indigenous or local person creates serious difficulties in defining the scope of application of the right. I acknowledge, however, that there may be various legitimate reasons for this lack of consensus, including historical and political reasons, which go beyond the scope of the discussion in this paper. Second, the proposed traditional knowledge right does not rectify the inequities caused by the excesses of the current system. It seeks to address the problems by expanding the intellectual property system rather than attempting to correct the existing flaws by contracting the regime.²²

For the purposes of this paper, I approach the issue of traditional knowledge from an intellectual property perspective, rather than focusing on the broader issue of indigenous rights. Further, since there is no widely accepted precise definition of tradition knowledge, in evaluating the potential consequences of a *sui generis* intellectual property style traditional knowledge right on accessible and affordable knowledge goods, I temporarily disregard the ethnic limitations that are

20. EMMANUEL HASSAN ET AL., INTELLECTUAL PROPERTY AND DEVELOPING COUNTRIES: A REVIEW OF THE LITERATURE 44–45 (2010); WIPO IGC, PROPOSAL PRESENTED BY THE AFRICAN GROUP TO THE FIRST MEETING OF THE INTERGOVERNMENTAL COMMITTEE ON INTELLECTUAL PROPERTY AND GENETIC RESOURCES, TRADITIONAL KNOWLEDGE AND FOLKLORE 6, WIPO Doc. WIPO/GRTKF/IC/1/10, (2001) (suggesting the need to develop a *sui generis* system for genetic resources and community rights).

21. See WIPO IGC, THE PROTECTION OF TRADITIONAL KNOWLEDGE: REVISED OBJECTIVES AND PRINCIPLES 27–30, 45, WIPO Doc. GRTKF/IC/16/5 (2010); Patent Act of 1952, 35 U.S.C. §§ 100–104 (2006) (the requirements for patentability); Copyright Act of 1976, 17 U.S.C. §§ 101–122 (2006) (the scope and subject matter for copyright protection).

22. One could argue that creating a new right is one way to correct the existing flaws. However, as I discuss later, this may bring its own set of problems.

inherent in the definition and treat all intergenerational knowledge as having equal value. In other words, in assessing the implications for cost and access, I assume that all communities potentially generate knowledge that could fit within the parameters of traditional knowledge.

I take this approach in order to assess the protection of the knowledge itself rather than the knowledge as it is understood when linked to the power dynamics that have resulted from the history of colonialism. This is not to suggest that the colonial history is irrelevant to the current power structure. The impact of colonialism on intellectual property law has already been discussed and well analyzed elsewhere.²³ Admittedly, cultural values may shape the way in which a

23. See David Castle & E. Richard Gold, *Traditional Knowledge and Benefit Sharing: From Compensation to Transaction*, in ACCESSING AND SHARING THE BENEFITS OF THE GENOMICS REVOLUTION 65, 68 (Peter W.B. Phillips & Chika B. Onwuekwe eds., 2007); Ruth L. Gana, *The Myth of Development, The Progress of Rights: Human Rights to Intellectual Property and Development*, 18 LAW & POL'Y 315, 329 (1996) (observing that developing countries were not signatories to the early international intellectual property treaties but the treaty provisions were often extended to them through the colonial administration); Olufunmilayo B. Arewa, *TRIPS and Traditional Knowledge: Local Communities, Local Knowledge, and Global Intellectual Property Frameworks*, 10 MARQ. INTELL. PROP. L. REV. 155, 160–163 (2006) (arguing that colonialism created a unequal power dynamic between countries and that such power discrepancies influenced intellectual property law); CHIDI OGUAMANAM, INTERNATIONAL LAW AND INDIGENOUS KNOWLEDGE: INTELLECTUAL PROPERTY, PLANT BIODIVERSITY, AND TRADITIONAL MEDICINE 57 (2006) (arguing that the political, legal, and economic structures in most post colonial societies reflect colonial values and are therefore complicit in the Western industrial model. Hence, these states and their ecological policies fail to encourage indigenous knowledge or truly reflect indigenous aspirations); Chidi Oguamanam, *Localizing Intellectual Property in the Globalization Epoch: The Integration of Indigenous Knowledge*, 11 IND. J. GLOBAL LEGAL STUD. 135, 154 (2004) (explaining that intellectual property laws are a result of colonialism); Chidi Oguamanam, *Local Knowledge as Trapped Knowledge, Intellectual Property, Culture, Power and Politics*, 11 J. WORLD INTELL. PROP. 29, 32 (2008) (describing TRIPS as “the historical legacy of colonial disdain, exclusion, derogation and appropriation as a policy framework for dealing with local knowledge”); Paul Kuruk, *The Role of Customary Knowledge Under Sui Generis Frameworks of Intellectual Property Rights in Traditional and Indigenous Knowledge*, 17 IND. INT'L & COMP. L. REV. 67, 86–92 (2007) (discussing the effect of colonialization on laws in Africa, the United States, and New Zealand); Peter K. Yu, *World Trade, Intellectual Property And the Global Elites: An Introduction*, 10 CARDOZO J. INT'L & COMP. L. 1, 3–4 (2002) (“Against a background of colonial and semi-colonial history, less developed countries begin to develop resentment toward developed countries and multinational corporations. Eventually, this resentment might spill over to the international intellectual property system and other trade-related areas, thus creating a legitimacy crisis within the international trading system.”); Rosemary J. Coombe, *Cultural and Intellectual Properties: Occupying the Colonial Imagination*, 16.1 POLAR 8 (1993); Chantal Thomas, *Critical Race Theory and Postcolonial Development Theory: Observations on Methodology*, 45 VILL. L. REV. 1195, 1198–99 (2000) (“The external postcolonial development critique of the international order asserts that it, though informed by seemingly egalitarian liberal ideals, perpetuated the ‘underdevelopment’—that is, the

society treats property. Some may therefore consider it impossible, even hypothetically, to isolate the knowledge from the knowledge generating communities.²⁴ However, by separating the issue of the protection of certain kinds of knowledge from the questions of power and equality, one can evaluate the protection of the knowledge based on the *characteristics of the knowledge* itself rather than on the *characteristics of the people* who generate that knowledge. Thus, one may consider, for example, the implications of protecting knowledge or works that are based on the collective intellectual efforts of several generations of an identifiable community, indigenous or otherwise. Further, since the boundaries of traditional knowledge are yet to be clearly defined, this approach can serve as a useful starting point from which to assess the potential benefits and harms of a *sui generis* traditional knowledge right. There may not be such a fundamental difference between some of the knowledge generated by non-indigenous communities and that which is generated by indigenous or local communities.²⁵ If this is so, then a traditional knowledge right could encompass a wide range of material from several different cultural groups.

The traditional knowledge narrative suggests that intellectual property law is under inclusive because it fails to protect much of the knowledge and creations of traditional knowledge generating communities. However, intellectual property may be a poor tool for addressing traditional knowledge concerns, except to the extent that intellectual property law encroaches on indigenous and local communities. In my view, a significant portion of the problem is due to the overreach of intellectual property law. By this I mean that the various forms of intellectual property have been used to assert rights in ways that tend to disregard competing interests, which should be given greater value. While I question the utility of a *sui generis* right, I acknowledge that there may be a role for defensive uses of intellectual property.²⁶ Nonetheless, I suggest, with a view to respecting traditional

entrenched economic inequality relative to the North—of Southern countries, by failing to correct economic disadvantages bequeathed to the South by colonialism.”).

24. Dorothy E. Roberts, *Why Culture Matters to Law: the Difference Politics Makes* in CULTURAL PLURALISM, IDENTITY POLITICS, AND THE LAW, AUSTIN SARAT & THOMAS R. KEARNS, EDS. 83 (1999) (Observing that Culture matters to law and that apparently neutral legal principles that purport to disregard culture effectively privilege the existing dominant cultural norms.)

25. In other words, various communities may generate (and may have generated greater quantities before industrialization) ecological knowledge, community artwork, songs, or culturally specific textiles, for example.

26. See *infra* Section V, Part B (“Intellectual Property Related Solutions that Don’t

knowledge while encouraging access to affordable knowledge goods, that it would be preferable to curtail rather than expand the global intellectual property regime.²⁷

Part II of this paper contextualizes the debate by providing some background about TRIPS, the allegations of bio-piracy and the international discussions on traditional knowledge. The third part of the paper outlines the analytical framework, which aims to take into account the perspective of developing countries as well as the benefit to the public in having access to affordable knowledge goods. Part IV of the paper discusses some of the rationales for intellectual property and compares them to the goals of traditional knowledge. The paper identifies some of the challenges of utilizing an intellectual property model to create a *sui generis* regime for the protection of this intergenerational knowledge. As part of that discussion, I draw parallels between the misappropriation concerns expressed by traditional or indigenous communities and those expressed by individuals from other communities regarding control over genetic resources. Finally, I offer some preliminary suggestions about how reframing the debate may assist in advancing the dialogue.

I. THE TRADITIONAL KNOWLEDGE QUESTION

A. *The Backlash against TRIPS*

The TRIPS Agreement was a major development in international intellectual property law because it established minimum enforceable standards. However, the increased global protection for intellectual property rights has generated some negative reaction, particularly in respect of developing country issues.²⁸ For instance, the international

Require an Expansion of the Existing Regime"); see Daniel Wuger, *Prevention of Misappropriation of Intangible Cultural Heritage Through Intellectual Property Laws in POOR PEOPLE'S KNOWLEDGE: PROMOTING INTELLECTUAL PROPERTY IN DEVELOPING COUNTRIES* 183, 197 (J. Michael Finger and Philip Schuler eds, 2004). I thank Margaret Chon for underscoring the value of defensive uses of intellectual property.

27. I speak of a global intellectual property regime rather than the TRIPS Agreement, *supra* note 6, specifically. First, while TRIPS is significant because it incorporates the *Berne Convention*, *infra* note 94, and the *Paris Convention*, *infra* note 116, by reference and sets minimum enforceable standards, it is only one of several intellectual property treaties. Secondly, the work on traditional knowledge is taking place beyond the context of TRIPS. It is therefore helpful to consider the international intellectual property system, to the extent one exists, as more than just TRIPS.

28. See James Boyle, *A Manifesto on WIPO and the Future of Intellectual Property*, 2004 DUKE L. & TECH. REV. 0009, 2 (2004) (criticizing the WIPO for increasing intellectual property rights to the detriment of developing countries); Laurence R. Helfer, *Towards a*

intellectual property regime has been characterized as reflecting Western values.²⁹ In addition, TRIPS has been criticized for its detrimental impact on various issues. These range from the relationship between patents and access to medicines, and copyright and access to educational materials, to allegations of patent-related bio-piracy and the misappropriation of cultural heritage.³⁰

One of the salient concerns about the TRIPS has been its effect on access to affordable knowledge goods. Patents and copyright, in particular, have been criticized on this basis. From a distributive justice lens, this appears to be a fair critique. Arguably, intellectual property generating countries have benefited from TRIPS far more than developing countries.³¹ This is because information-exporting countries

Human Rights Framework for Intellectual Property, 40 U.C. DAVIS L. REV. 971, 973–974 (2007) (describing the work of the WTO and WIPO being “brought . . . to a virtual standstill” by resistance to the global expansion of IP rights); Open Society Institute, *Geneva Declaration on the Future of the World Intellectual Property Organization* 2 (2004), available at <http://www.cptech.org/ip/wipo/genevadeclaration.html> (stating that a uniform approach that “embraces the highest levels of intellectual property protection for everyone leads to unjust and burdensome outcomes for countries that are struggling to meet the most basic needs of their citizens”).

29. Adebambo Adewopo, *The Global Intellectual Property System and Sub-Saharan Africa: A Prognostic Reflection*, 33 U. TOL. L. REV. 749, 749–50 (2002); Olufunmilayo B. Arewa, *TRIPS and Traditional Knowledge: Local Communities, Local Knowledge, and Global Intellectual Property Frameworks*, 10 MARQ. INTELL. PROP. L. REV. 155, 160–63 (2006) (positing that the global intellectual property regime reflects cultural hierarchies, with most developing country cultures considered less advanced, and their values therefore not reflected in the IP treaties); Krishna Ravi Srinivas, *Intellectual Property Rights and Traditional Knowledge: The Case of Yoga*, 47 ECON. & POL. WKLY. 2866–2871 (2007), available at <http://ssrn.com/abstract=1005298>. Developing countries were initially allowed a grace period to implement their TRIPS obligations, which has now passed. See TRIPS Agreement, *supra* note 6, at art. 66. However, a further exception has been made for least developed countries with respect to the protection of pharmaceutical products. This exception was created under para 7 of the *Doha Declaration on TRIPS and Public Health*, which states: “We also agree that the least-developed country members will not be obliged, with respect to pharmaceutical products, to implement or apply Sections 5 and 7 of Part II of the TRIPS Agreement or to enforce rights provided for under these Sections until 1 January 2016, without prejudice to the right of least-developed country members to seek other extensions of the transition periods as provided for in Article 66.1 of the TRIPS Agreement. We instruct the Council for TRIPS to take the necessary action to give effect to this pursuant to Article 66.1 of the TRIPS Agreement.”

30. See Frederick M. Abbott, *TRIPS in Seattle: The Not-So-Surprising Failure and the Future of the TRIPS Agenda*, 18 BERKELEY J. INT’L L. 165, 171 (2000) (noting the patent-related health concerns of developing country members); Lawrence R. Helfer, *Towards a Human Rights Framework for Intellectual Property*, 40 U.C. DAVIS L. REV. 971, 986–88 (2007); Charles R. McManis, *Intellectual Property, Genetic Resources and Traditional Knowledge Protection: Thinking Globally, Acting Locally*, 11 CARDOZO J. INT’L & COMP. L. 547, 548–49 (2003) (discussing the North-South division and the negative reaction of farmers in India to the TRIPS Agreement).

31. EMMANUEL HASSAN, OHID YAQUB & STEPHANIE DIEPEVEEN, *INTELLECTUAL*

tend to favor a globalized protectionist model in order to maximize their economic gains.³² Unfortunately, under this kind of protectionist model, intellectual property may extend into other social spheres and cultural objects may be subject to appropriation and commercialized for use on global markets.³³ In sum, a protectionist model benefits industrialized rather than industrializing countries.³⁴

An international intellectual property model can be described as protectionist if it tends towards longer periods of protection rather than shorter terms of protection, creates more property rights rather than less, imposes uniform substantive minimum standards of protection on all countries, and removes from States the discretion to adjust the substantive standards to suit their level of economic development.³⁵ This is not unlike the situation that has resulted under TRIPS and led to debates about the misappropriation of traditional knowledge. In response, various international organizations, including the WTO, have been engaged in discussions about the relationship between traditional knowledge and intellectual property. Thus, for example, the 2001 WTO *Doha Ministerial Declaration* directs the Council for TRIPS³⁶ to explore the relationship between TRIPS, the *Convention on Biological Diversity* and the protection of traditional knowledge and folklore.³⁷

PROPERTY AND DEVELOPING COUNTRIES: A REVIEW OF THE LITERATURE 48 (2010).

32. PETER DRAHOS, A PHILOSOPHY OF INTELLECTUAL PROPERTY 190–191 (1996).

33. *Id.*

34. Consider, for example, the comments of the United States Trade Representative Ambassador Ron Kirk about the importance of intellectual property rights for American industries. Ambassador Kirk's written speech characterizes innovation and creativity as "the engines of the American economy" and outlines an agenda which is aimed at adequately protecting American intellectual property rights in foreign nations. His speech describes intellectual property piracy as a "job killer" and an "export killer." See Ambassador Ron Kirk, Protecting Tomorrow: IP and Green Technology (April 26, 2010), available at <http://www.ustr.gov/about-us/press-office/speeches/transcripts/2010/april/remarks-ambassador-ron-kirk-world-intellectual> (last visited October 15, 2010); see also U.S. GOV'T ACCOUNTABILITY OFFICE, INTELLECTUAL PROPERTY: OBSERVATIONS ON EFFORTS TO QUANTIFY THE ECONOMIC EFFECTS OF COUNTERFEIT AND PIRATED GOODS 4 (2010) (underlining the importance of intellectual property to the United States Economy); see Nam D. Pham, *The Impact of Innovation and the Role of Intellectual Property Rights on U.S. Productivity, Competitiveness, Jobs, Wages, and Export* 52 (2010), available at http://www.memopage.com/bourse/script-news/includes/openwysiwyg2/uploaded_docs/15567_gipc_execstudy.pdf (this research paper, which was prepared for the United States Chamber of Commerce, concludes that intellectual property industries are key to sustaining American economic growth and that they are more competitive than non-intellectual property industries).

35. PETER DRAHOS, A PHILOSOPHY OF INTELLECTUAL PROPERTY 189 (1996).

36. See TRIPS Agreement, *supra* note 6.

37. *Convention on Biological Diversity* (with annexes), concluded at Rio de Janeiro on June 5, 1992, [hereinafter CBD] 1760 UNTS 79; 31 ILM 818 (1992); WTO, Ministerial

However, the primary international forum for negotiating an international instrument to protect traditional knowledge is the WIPO.³⁸ The WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (“IGC”) was established by the WIPO General Assembly in October 2000 to study the relationship between intellectual property and these related subjects.³⁹ The WIPO IGC is mandated to undertake text-based negotiations with the objective of drafting an international legal instrument to “ensure the effective protection” of genetic resources, traditional knowledge and traditional cultural expressions (collectively referred to as traditional knowledge for the purposes of this paper).⁴⁰

B. What Is Traditional Knowledge?

But what is traditional knowledge? More than ten years following its establishment, the WIPO IGC struggles to reach a clear definition of traditional knowledge. The definition is complicated because indigenous peoples, communities and nations may be holders of

Declaration of 14 November 2001, ¶ 19, WTO Doc. WT/MIN(01)/DEC/1, [hereinafter *Doha Declaration*]. For example, the TRIPS Council is working on proposals to address the issue of disclosure of the origin of the genetic materials used in respect of gene related patents. See *Background and the Current Situation*, WTO http://www.wto.org/english/tratop_e/TRIPS_e/art27_3b_background_e.htm (last visited Sept. 10, 2010).

38. I will therefore direct much of my attention in this piece to the work that has been going on at WIPO and the documents that have been produced as a result of those efforts.

39. WIPO, MATTERS CONCERNING INTELLECTUAL PROPERTY AND GENETIC RESOURCES, TRADITIONAL KNOWLEDGE AND FOLKLORE, WIPO Doc. WO/GA/26/6 (2000).

40. Traditional knowledge and traditional cultural expressions are often seen as part of a single “integrated heritage.” However, due to the specific legal and policy questions raised by traditional cultural expressions in the intellectual property context, WIPO has separate, but parallel work programs for traditional knowledge and traditional cultural expressions. See *Traditional Cultural Expressions (Folklore)*, WIPO, <http://www.wipo.int/tk/en/folklore/> (last visited Sept. 22, 2010). This paper considers intellectual property as a broad category despite the many distinctions between patent law, copyright law and trademark law. The focus of this work is on the underlying similarities that inform intellectual property law and policy. As such, reference to traditional knowledge will be used as a broad category that may include traditional cultural expressions. Such grouping is not inconsistent with the concept of traditional knowledge and traditional cultural expressions, and some early WIPO IGC documents have even defined traditional cultural expressions as a subset of traditional knowledge. See WIPO, INTERGOVERNMENTAL COMMITTEE ON INTELLECTUAL PROPERTY AND GENETIC RESOURCES, TRADITIONAL KNOWLEDGE AND FOLKLORE ¶ 30, WIPO Doc. WIPO/GRTKF/IC/1/3 (2001). The text of such agreement is to be submitted to the WIPO General Assembly by 2011. For the recent IGC mandate, see WIPO IGC, MATTERS CONCERNING THE INTERGOVERNMENTAL COMMITTEE ON INTELLECTUAL PROPERTY AND GENETIC RESOURCES, TRADITIONAL KNOWLEDGE AND FOLKLORE, WIPO Doc. WO/GA/38/9 (2009).

traditional knowledge, but not all traditional knowledge holders are necessarily indigenous.⁴¹ Further, since traditional knowledge holders are incredibly diverse, it has been suggested that it may not be possible to have a single definition of the term.⁴² Thus, despite the attempt to define traditional knowledge in relation to indigenous peoples, the category of persons included as traditional knowledge holders is potentially broader than indigenous peoples and nations. Moreover, traditional knowledge may be difficult to distinguish from other types of knowledge.⁴³

There are various descriptions of traditional knowledge in the literature.⁴⁴ The WIPO Secretariat chose a working definition that reflected the general approach used in other international fora.⁴⁵ Traditional knowledge is loosely defined by WIPO as including: “tradition-based literary, artistic or scientific works; performances; inventions; scientific discoveries; designs; marks, names and symbols; undisclosed information; and all other tradition-based innovations and creations resulting from intellectual activity in the industrial, scientific, literary, or artistic fields.”⁴⁶

41. WIPO, INTELLECTUAL PROPERTY NEEDS AND EXPECTATIONS OF TRADITIONAL KNOWLEDGE HOLDERS: WIPO REPORT ON FACT-FINDING MISSIONS ON INTELLECTUAL PROPERTY AND TRADITIONAL KNOWLEDGE (1998–1999), 26 (2001), available at <http://www.wipo.int/tk/en/tk/ffm/report/index/html>.

42. Graham Dutfield, *TRIPS-Related Aspects of Traditional Knowledge*, 33 CASE W. RES. J. INT’L L. 233, 240 (Spring 2001).

43. WIPO IGC, MATTERS CONCERNING INTELLECTUAL PROPERTY AND GENETIC RESOURCES, TRADITIONAL KNOWLEDGE AND FOLKLORE ¶ 63–70, WIPO Doc. GRTKF/IC/1/3 (2001); see Graham Dutfield, *TRIPS-Related Aspects of Traditional Knowledge*, 33 CASE W. RES. J. INT’L L. 233, 241–42 (Spring 2001).

44. See, e.g. Daniel Gervais, *Traditional Knowledge & Intellectual Property: A TRIPS-Compatible Approach*, 2005 MICH. ST. L. REV. 137, 140–41 (Spring 2005) (“Characteristically, traditional knowledge is thus knowledge that: is traditional only to the extent that its creation and use are part of the cultural traditions of a community—‘traditional,’ therefore, does not necessarily mean that the knowledge is ancient or static; is representative of the cultural values of a people and thus is generally held collectively; is not limited to any specific field of technology or the arts; is ‘owned’ by a community”); Angela R. Riley, “*Straight Stealing*”: Towards an Indigenous System of Cultural Property Protection, 80 WASH. L. REV. 69, 77 (2005) (“indigenous peoples’ claims to cultural property include not only places and objects (and all other physical materials of a particular culture), but also traditions or histories that are connected to the group’s cultural life, including songs, rituals, ceremonies, dance, traditional knowledge, art, customs, and spiritual beliefs.”).

45. WIPO, INTELLECTUAL PROPERTY NEEDS AND EXPECTATIONS OF TRADITIONAL KNOWLEDGE HOLDERS: WIPO REPORT ON FACT-FINDING MISSIONS ON INTELLECTUAL PROPERTY AND TRADITIONAL KNOWLEDGE (1998–1999), 25 (2001), available at <http://www.wipo.int/tk/en/tk/ffm/report/index/html>.

46. WIPO IGC, TRADITIONAL KNOWLEDGE—OPERATIONAL TERMS AND DEFINITIONS 11, WIPO Doc. WIPO/GRTKF/IC/13/9 (2002). For the purpose of its 2008 Gap Analysis, WIPO described TK as “referring in general to the content or substance of

The term “tradition-based” refers to “knowledge systems, creations, innovations and cultural expressions” which have been transmitted from one generation to the next.⁴⁷ In addition, the knowledge system is generally perceived as pertaining to a particular people or territory. Finally, it is described as knowledge that is not necessarily old or static but rather that evolves in response to a changing environment.⁴⁸

As discussed, the variety of subject matter that can be described as traditional knowledge includes: traditional medicinal practices, such as Indian Ayurvedic medicine, traditional farming practices, knowledge relating to the uses of certain biological or chemical resources, and traditional dances, songs, or rituals.⁴⁹ Thus, traditional knowledge, broadly speaking, includes cultural works as well as intergenerational knowledge about the properties of certain plants, such as the appetite suppressing qualities of the *Hoodia Cactus*. Broadly speaking, traditional knowledge can be described as the result of intellectual activity, which is handed down through the generations, and which pertains to particular cultural groups.

As I will elaborate on below, this broad definition of traditional knowledge is one of its frailties.

knowledge resulting from intellectual activity in a traditional context, and includes the knowhow, skills, innovations, practices and learning that form part of traditional knowledge systems, and knowledge embodying traditional lifestyles of indigenous and local communities, or contained in codified knowledge systems passed between generations. It is not limited to any specific technical field, and may include agricultural, environmental and medicinal knowledge, and knowledge associated with genetic resources. This general description of TK is based on the work of the Committee itself.” See WIPO IGC, THE PROTECTION OF TRADITIONAL KNOWLEDGE: DRAFT GAP ANALYSIS: REVISION 4, WIPO Doc. WIPO/GRTKF/IC/13/5/(b) Rev. (2008); WIPO IGC, MATTERS CONCERNING INTELLECTUAL PROPERTY AND GENETIC RESOURCES, TRADITIONAL KNOWLEDGE AND FOLKLORE 11, WIPO Doc. WIPO/GRTKF/IC/1/3 (2001).

47. WIPO IGC, TRADITIONAL KNOWLEDGE—OPERATIONAL TERMS AND DEFINITIONS 11, WIPO Doc. WIPO/GRTKF/IC/13/9 (May 20, 2002)

48. WIPO IGC, TRADITIONAL KNOWLEDGE—OPERATIONAL TERMS AND DEFINITIONS 11, WIPO Doc. WIPO/GRTKF/IC/13/9 (May 20, 2002); GRAHAM DUTFIELD & UMA SUTHERSANEN, GLOBAL INTELLECTUAL PROPERTY LAW 7 (2008).

49. Emmanuel Hassan, Ohid Yaqub & Stephanie Diepeveen, INTELLECTUAL PROPERTY AND DEVELOPING COUNTRIES: A REVIEW OF THE LITERATURE 39–40 (2010) (traditional knowledge may include: literary, artistic or scientific works, agricultural technologies and techniques, religious or spiritual practices, dance or medical treatments); Bio-piracy of Traditional Knowledge, Traditional Knowledge Digital Library, www.tkdlib.org/tkdlib/langdefault/common/Biopiracy.asp?GL=3DEng (last visited Sept. 8, 2010). Some aspects of Yoga and Ayurvedic medicine may be protectable as IP. For example, some Yoga poses have been copyrighted, and certain Ayurvedic products may be protected under trademark law. See, e.g., BIKRAM’S BEGINNING YOGA CLASS / BIKRAM CHOUDHURY WITH BONNIE JONES REYNOLDS, Registration No. TX0005259325 (2000) (Copyright Registration).

C. The Existing Legal Framework, Biopiracy and Traditional Knowledge

In this section of the paper, I will discuss the relationship between traditional knowledge and intellectual property, and provide some examples of biopiracy and misappropriation.

Some traditional knowledge can be protected as intellectual property, while some cannot.⁵⁰ The international dialogue relates to the types of traditional knowledge that are not subject to any internationally recognized legal right. Since the most controversial stories of misappropriation relate to patent and copyright, I focus on these two kinds of intellectual property in relation to traditional knowledge.

Traditional knowledge will not be protected by intellectual property law if it is already in the public domain, or if it cannot otherwise meet the criteria for intellectual property protection. It may not be possible to meet the criteria for patent protection, for example, if the claimed invention is not new, useful and non-obvious.⁵¹ If the information has not been kept secret, it cannot be protected under the law of trade secret and confidential information.⁵² If the work is not an “original” work within the meaning of copyright law, it will not be copyrightable, and if it is not a mark used in the course of trade it will not be

50. See Peter K. Yu, *Cultural Relics, Intellectual Property, and Intangible Heritage*, 81 TEMP. L. REV. 433, 484–85 (Summer 2008) (noting the different types of legal protection that is available for the two types of traditional knowledge); Daniel Gervais, *Traditional Knowledge & Intellectual Property: A TRIPS-Compatible Approach*, 2005 MICH. ST. L. REV. 137, 149–60 (Spring 2005) (analyzing traditional knowledge using existing intellectual property framework and showing the difficulty of protecting some types of traditional knowledge); Kal Raustiala, *Density and Conflict in International Intellectual Property Law*, 40 U.C. DAVIS L. REV. 1021, 1033 (2007) (“[R]efined products based on traditional knowledge and genetic resources are protected via international IP law, while the underlying traditional knowledge and resources are not.”); STEPHEN A. HANSEN & JUSTIN W. VANFLEET, AMERICAN ASSOCIATION FOR THE ADVANCEMENT OF SCIENCE, TRADITIONAL KNOWLEDGE AND INTELLECTUAL PROPERTY: A HANDBOOK ON ISSUES AND OPTIONS FOR TRADITIONAL KNOWLEDGE HOLDERS IN PROTECTING THEIR INTELLECTUAL PROPERTY AND MAINTAINING BIOLOGICAL DIVERSITY 4–5 (2005).

51. Patent Act of 1952, 35 U.S.C. § 101 (2006); 35 U.S.C. § 102 (novelty is destroyed if: the invention was “known or used by others in the [United States]” prior to the applicant’s date of invention, the invention was “described in a printed publication” by anyone anywhere in the world prior to the applicant’s date of invention, the invention was described by another in an issued patent or published patent application prior to the applicant’s date of invention, the invention was put into public use or placed on sale for more than 1 year prior to the patent application date, or the applicant did not in fact discover or invent the subject matter he or she seeks to patent); TRIPS Agreement, *supra* note 6, at art. 27.1 (provision governing patentable subject matter).

52. Uniform Trade Secrets Act, 14 U.L.A. 437 (1990) (this uniform code has been adopted in 45 US states as of 2007); TRIPS Agreement, *supra* note 6, at art. 39 (provision governing protectable subject matter of trade secrets).

protectable under trademark law.⁵³

Yoga is an example of subject matter that has been described as traditional knowledge and which is partially protected through intellectual property law. Although it has become popular throughout the world, yoga is a traditional practice that originated in India several generations ago.⁵⁴ While yoga per se is not protectable, yoga poses have been copyrighted in the United States, leading to debates about whether yoga is in the public domain.⁵⁵ Other well-known examples of traditional knowledge include the medicinal uses of spices such as turmeric and plants like the *hoodia cactus*, or neem.⁵⁶

The patenting of turmeric is an example of alleged misappropriation. Although the traditional knowledge about the uses of turmeric is not protectable, two Indian expatriates based in the United States obtained an American patent on the use of turmeric in wound healing.⁵⁷ Turmeric is a spice used in Indian cooking. It has also been used in traditional medicinal practices to heal wounds and rashes. The Council of Scientific and Industrial Research (“CSIR”) in India challenged the validity of the patent, arguing that the use of turmeric was not novel

53. Copyright Act, 17 U.S.C. §102 (originality requirement); Trademark Act of 1946, 15 U.S.C. §§ 1051-1055; TRIPS Agreement, *supra* note 6, at art. 15 (provision governing protectable subject matter of trademarks).

54. See *Patent Exploitation*, The TIMES OF INDIA (May 22, 2007, 12:13 AM), http://timesofindia.indiatimes.com/Patent_Exploitation/articleshow/2065331.cms (explaining that the yoga industry is estimated to be worth approximately \$3 billion dollars in the United States and \$8 billion dollars worldwide); ELIZABETH DE MICHELIS, A HISTORY OF MODERN YOGA: PATANJALI AND WESTERN ESOTERICISM 2 (2004) (stating generally that the origins of modern yoga that is prevalent today began over 150 years ago).

55. See generally Krishna Ravi Srinivas, *Intellectual Property Rights and Traditional Knowledge: The Case of Yoga*, 47 ECON. & POL. WKLY. 2866-2871 (2007), available at <http://ssrn.com/abstract=1005298>; BIKRAM'S BEGINNING YOGA CLASS / BIKRAM CHOUDHURY WITH BONNIE JONES REYNOLDS, Registration No. TX0005259325 (2000) (Copyright Registration).

56. Commission on Intellectual Property Rights (United Kingdom), *Integrating Intellectual Property Rights and Development Policy* 76 (2002) (explaining that extracts from the neem tree have long been used in India to fight off fungal infections, as well as for various other purposes. In 1994, the European Patent Office granted a patent to an American company and the U.S. Department of Agriculture for a method of controlling fungus on plants using extracts of neem oil. A coalition of Indian farmers and non-governmental organizations alleged that the patent was based on centuries of Indian traditional knowledge and successfully argued that it should not be patentable); Lee Gillespie-White & Eric Garduño, *Treading an Independent Course for Protecting Traditional Knowledge*, International Intellectual Property Institute (2002) (discussing the *hoodia cactus*). See U.S. Patent No. 6,126,950 (filed April 10, 1998); U.S. Patent No. 5,368,856 (filed Aug. 2, 1993); U.S. Patent No. 5,356,628 (filed Dec. 2, 1993); U.S. Patent No. 5,298,251 (filed July 21, 1993); Shubha Ghosh, *Globalization, Patents, and Traditional Knowledge*, 17 COLUM. J. ASIAN L. 73, 76-77 (2003) (discussing the neem case).

57. U.S. Patent No. 5,401,504 (filed Dec. 28, 1993).

because it had been used medicinally in India for thousands of years. The CSIR supported its claim with a printed publication from an Indian medical association and was successful in having the patent revoked.⁵⁸ However, if the traditional medicinal knowledge had not been documented, the patent may not have been invalidated.⁵⁹

An example of alleged biopiracy is that of the *hoodia cactus* plant. The knowledge held by the San people of southern Africa about the use of the *hoodia cactus* as an appetite suppressant is not protectable.⁶⁰ Yet an invention based on this knowledge was protected through patent law and licensed to Pfizer. Several generations of the San people of

58. U.S. Patent No. 5,401,504 (filed Dec. 28, 1993) (all claims cancelled as of April 21, 1998 in Reexamination Certificate (3500th)); *Bio-piracy of Traditional Knowledge*, Traditional Knowledge Digital Library, <http://www.tkdil.res.in/tkdil/langdefault/common/Biopiracy.asp?GL=Eng> (last visited Sept. 8, 2010); Commission on Intellectual Property Rights (United Kingdom), *Integrating Intellectual Property Rights and Development Policy* 76 (2002); Alyson Slack, *Turmeric*, 15 TED CASE STUDIES 700 (2004), available at <http://www1.american.edu/ted/turmeric.htm>; Graham Dutfield, *TRIPS Related Aspects of Traditional Knowledge*, 33 CASE W. RES. J. INT'L L. 233, 247-48 (Spring 2001); Shubha Ghosh, *Traditional Knowledge, Patents, and the New Mercantilism (Part II)*, 85 J. PAT. & TRADEMARK OFF. SOC'Y 885, 898-902 (2003) (describing the turmeric controversy surrounding the cancellation of Dr. Shiva's turmeric patent); Olufunmilayo B. Arewa, *TRIPS and Traditional Knowledge: Local Communities, Local Knowledge, and Global Intellectual Property Frameworks*, 10 MARQ. INTELL. PROP. L. REV. 155, 172 (2006) (describing the cancellation of all claims in U.S. Patent No. 5,401,504); Shubha Ghosh, *Globalization, Patents, and Traditional Knowledge*, 17 COLUM. J. ASIAN L. 73, 93-97 (2003) (describing the cancellation of all claims in U.S. Patent No. 5,401,504 (filed Dec. 28, 1993) and mentioning turmeric patent claims that have not been cancelled such as U.S. Patent No. 6,048,533 (filed Sept. 1, 1998) and U.S. Patent No. 5,897,865 (filed June 30, 1997)); Maggie Kohls, *Blackbeard or Albert Schweitzer: Reconciling Biopiracy*, 6 CHI. KENT J. INTELL. PROP. 108, 120-21, 131 (2007) (describing the cancellation of all claims in U.S. Patent No. 5,401,504 (filed Dec. 28, 1993) and stating that the turmeric case created a negative perception of United States patent examination procedures).

59. See Patent Act of 1952, 35 U.S.C. § 102 (2006) (Novelty is destroyed if prior art is found describing the invention seeking patent protection. Prior art can be an invention that was "known or used by others in [the United States]" prior to the applicant's date of invention. In addition, it can be an invention "described in a printed publication" by anyone anywhere in the world prior to the applicant's date of invention, or described by another in an issued patent or published patent application prior to the applicant's date of invention. In this instance, the government of India was able to challenge the novelty of the patent because the traditional knowledge had been documented in a printed publication. However, this is not always the case); Margo A. Bagley, *Patently Unconstitutional: The Geographical Limitation on Prior Art in Small World*, 87 MINN. L. REV. 679, 680-683 (discussing the neem controversy and how the geographic limitation in 35 U.S.C. § 102 creates problems regarding the use of inventions from developing countries).

60. See Commission on Intellectual Property Rights (United Kingdom), *Integrating Intellectual Property Rights and Development Policy* 77-78 (2002); Olufunmilayo B. Arewa, *Piracy, Biopiracy, and Borrowing: Culture, Cultural Heritage and the Globalization of Intellectual Property* 15-16 (Case Res. Paper Series in Legal Stud., Working Paper No. 04-19, 2006), available at <http://ssrn.com/abstract=596921>.

southern Africa have used this plant to stave off hunger. An extract from the plant was patented for its hunger-fighting properties, and a license was granted to the pharmaceutical giant, Pfizer. Unlike the turmeric case, the patent on the plant extract was not invalidated.⁶¹ The pharmaceutical giant could profit if its *Hoodia*-based weight loss drug is successful, while the San remain in poverty.⁶²

Unfortunately, even if it has some social or economic value, medicinal knowledge about the uses of turmeric or *hoodia* cannot be protected under the current regime.⁶³ First, the knowledge has been around for generations. It would, therefore, fail to meet the test of novelty under patent law.⁶⁴ Secondly, the knowledge is not attributable to a particular individual or entity. In other words, there is no identifiable creator, but possibly a collective of creators. It has been suggested that the communal nature of traditional knowledge is not an obstacle to protection because it is possible to have collective ownership of an intellectual property right.⁶⁵ However, while group work can be

61. U.S. Patent No. 7,166,611 (filed June 22, 2004) (this patent is cross referenced to U.S. Pat. No. 6,376,657, granted Apr. 23, 2002, which is a U.S. National Phase of PCT/GB98/01100, filed Apr. 15, 1998).

62. See Rachel Wynberg, *Rhetoric, Realism and Benefit-Sharing: Use of Traditional Knowledge of Hoodia Species in the Development of an Appetite Suppressant*, 7 J. WORLD INTELL. PROP. 851, 865 (2004) (from the Benefit Sharing Agreement between the CSIR and the San, only between 0.03 percent and 1.2 percent of net sales of the product is given to the San because the San royalty only constitutes royalties received by CSIR for the product); Rachel Wynberg, *Sharing the Crumbs with the San*, BioWatch South Africa (March 2003), available at <http://www.biowatch.org.za/main.asp?include=docs/clippings/csir-san.htm> (potential commercial profitability of the drug was estimated to be between \$1 billion and \$8 billion USD a year); see also Rachel Wynberg, Doris Schroeder & Roger Chennells, *Green Diamonds of the South: An Overview of the San-Hoodia Case*, in INDIGENOUS PEOPLES, CONSENT AND BENEFIT SHARING: LESSONS FROM THE SAN-HOODIA CASE 89–124 (Rachel Wynberg, Doris Schroeder & Roger Chennells eds. 2009); Rachel Wynberg et al., *Policies for Sharing Benefits from Hoodia*, in *Indigenous Peoples, CONSENT AND BENEFIT SHARING: LESSONS FROM THE SAN-HOODIA CASE* 127–41 (Rachel Wynberg, Doris Schroeder & Roger Chennells eds., 2009).

63. See Margo A. Bagley, *Patently Unconstitutional: The Geographical Limitation on Prior Art in a Small World*, 87 MINN. L. REV. 679, 680–683 (2003) (discussing the neem controversy and how the geographic limitation in the Patent Act of 1952, 35 U.S.C. § 102 creates problems with respect to the use and patenting of inventions that originate in developing countries). 35 U.S.C. § 102 allows for the patenting of an invention unless it was known or used by others in the United States, or patented or described in a printed publication in the United States or another country before it was invented by the patent applicant. So, if an invention was known or used by others in a foreign country but not patented or described in any *printed* publication, 35 U.S.C. §102 does not prohibit it from being patented in the United States.

64. See Patent Act of 1952, 35 U.S.C. § 102 (2006) (This provision requires that the invention be new. Therefore, if there is documentation that the invention was already within the public domain prior to filing the patent application, a patent may not be issued).

65. See Patent Act of 1952, 35 U.S.C. § 116 (This provision allows a group of inventors

protected under intellectual property law, the group still needs to be clearly identified as a collective of individuals who have each contributed to the creation or the innovation.⁶⁶

The inability to protect traditional knowledge leads to what appears to an inequitable result. The inadequacy of intellectual property law in preventing such uses has prompted a call to protect this intergenerational knowledge.⁶⁷ This becomes a question of equity because persons foreign to the group make use of their knowledge and are able to profit by obtaining formal legal protection through the use of intellectual property laws. Yet, the same laws are not effective in protecting the range of useful knowledge of these local and indigenous groups. The contradiction lies in the fact that intellectual property rights were sought because of the perceived value in the knowledge, yet the knowledge itself is not subject to any kind of internationally recognized legal right. The essence of the critique is about the injustice of the situation. In other words, it seems that the local and indigenous communities are not being treated fairly in these exchanges.

This is not to say that traditional knowledge cannot receive any protection under existing laws. Traditional knowledge and intellectual property converge in some areas but are quite distinct in other respects.⁶⁸ Thus, some kinds of traditional knowledge can be protected as intellectual property. For example, traditional knowledge holders make use of trademarks and geographical indications to protect marks

to jointly file for one invention even if the group of inventors did not “physically work together or at the same time” and did not make the same “type or amount contribution.” However, all inventors must apply jointly and make the required oath of inventorship as described in 35 U.S.C. § 115).

66. *Id.*

67. See, e.g., CARLOS M. CORREA, INTELLECTUAL PROPERTY RIGHTS, THE WTO AND DEVELOPING COUNTRIES: THE TRIPS AGREEMENT AND POLICY OPTIONS 172 (Third World Network ed., 2008) (referring to U.S. patent no. 5,304,718 on quinoa which was subsequently invalidated, and products based on plant materials and knowledge from indigenous communities such as Neem tree, kava, barbasco, endod, and turmeric) (citing Pat Roy Mooney, *The Parts of Life: Agricultural Biodiversity, Indigenous Knowledge, and the Role of the Third System*, 152–54 (1998)); Olufunmilayo B. Arewa, *TRIPS and Traditional Knowledge: Local Communities, Local Knowledge, and Global Intellectual Property Frameworks*, 10 MARQ. INTELL. PROP. L. REV. 155, 168–79 (2006); Dr. Gerard Bodeker, *Traditional Medical Knowledge, Intellectual Property Rights & Benefit Sharing*, 11 CARDOZO J. INT’L & COMP. L. 785 (Summer 2003); Lorna Dwyer, *Biopiracy, Trade, and Sustainable Development*, 19 COLO. J. INT’L ENTL. L. & POL’Y 219 (2008); Christine H. Farley, *Protecting Folklore of Indigenous Peoples: Is Intellectual Property the Answer?*, 30 CONN. L. REV. 1 (1997); Graham Dutfield, *TRIPS-Related Aspects of Traditional Knowledge*, 33 CASE W. RES. J. INT’L L. 233 (Spring 2001).

68. Peter K. Yu, *Cultural Relics, Intellectual Property, and Intangible Heritage*, 81 TEMP. L. REV. 433, 443–53 (Summer 2008).

that identify the goods as originating from a particular community.⁶⁹ Nonetheless, the existing intellectual property mechanisms for protecting traditional knowledge are insufficient.⁷⁰ This leads to the possibility of creating a new category of intangible property.

D. Creating New Categories of Intellectual Property

The starting point for WIPO appears to be an expansive definition of intellectual property that can encompass this new subject matter, even if it does not fit within the current regime. According to a 1990 WIPO study, the 1967 WIPO Convention is clear that intellectual property is a broad concept that can include matter that does not currently fall within existing categories.⁷¹ The definition of intellectual property includes “all other rights resulting from intellectual activity in the industrial, scientific, literary and artistic fields.”⁷²

WIPO defines its involvement in the possible protection of traditional knowledge to the extent that the knowledge could be

69. Doris Estelle Long, *Is Fame All There Is? Beating Global Monopolists at Their Own Marketing Game*, 40 GEO. WASH. INT'L L. REV. 123, 155–58 (2008) (identifying the use of trademark law as a way to strengthen local identities and protect traditional knowledge). One example is that of the Maori trademark in New Zealand; Creative Nz Agrees To Transfer Maori Trademark—Toi Iho Tm, VOXY.CO.NZ (May 21, 2010, 6:12 PM), <http://www.voxy.co.nz/national/creative-nz-agrees-transfer-maori-trademark-toi-iho-tm/5/49511> (describing the transfer of the Toi Iho trade marks to the Toi Iho Foundation); Susy Frankel, *Trademarks and Traditional Knowledge and Cultural Intellectual Property*, in TRADEMARK LAW AND THEORY: A HANDBOOK OF CONTEMPORARY RESEARCH 433, 434 (Graeme B. Dinwoodie & Mark D. Janis, eds., 2008) (“Indigenous peoples have recognized that . . . existing trademark regimes may be a means by which to protect their cultural icons, signs, and symbols.”).

70. See, e.g., COMM'N ON HUMAN RIGHTS SUB-COMM'N OF PREVENTION OF DISCRIMINATION AND PROT. OF MINORITIES WORKING GROUP ON INDIGENOUS POPULATIONS, THE MATAATUA DECLARATION ON CULTURAL AND INTELLECTUAL PROPERTY RIGHTS OF INDIGENOUS PEOPLES 1 (1993); Mathew Rimmer, *Australian Icons: Authenticity Marks and Identity Politics*, 3 INDIGENOUS L.J. 139, 153–54, 164–65 (2004) (describing the limitations of existing copyright, trademark law, and authenticity marks in protecting aboriginal artwork); Graham Dutfield, *Protecting Traditional Knowledge and Folklore: A Review of Progress in Diplomacy and Policy Formulation*, International Trade & Sustainable Development Series, 6–7 (2003), available at <http://www.iprsonline.org/resources/docs/Dutfield%20%20Protecting%20TK%20and%20Folklore%20-%20Blue%201.pdf> (“Asserting a property right over knowledge is insufficient to prevent abuses when so much traditional knowledge has fallen into the public domain and can no longer be controlled by the original TK holders.”).

71. WIPO, INTELLECTUAL PROPERTY NEEDS AND EXPECTATIONS OF TRADITIONAL KNOWLEDGE HOLDERS: WIPO REPORT ON FACT-FINDING MISSIONS ON INTELLECTUAL PROPERTY AND TRADITIONAL KNOWLEDGE (1998–1999), 6 (2001), available at <http://www.wipo.int/tk/en/tk/ffm/report/index/html>.

72. *Id.* at 16, 25; WIPO, Convention Establishing the World Intellectual Property Organization art. 2 (viii), (amended 1979).

considered intellectual property. The organization therefore recognizes that international intellectual property law is not static, but rather that it is possible to create new categories of intellectual property.

For instance, under TRIPS the meaning of intellectual property expanded to include subject matter, like geographical indications, that had not previously been explicitly protected as intellectual property in any widely accepted international agreement.⁷³ Additionally, there have been initiatives to protect matter that might otherwise not clearly meet the criteria for protection. The *WIPO Copyright Treaty*, for example, expressly requires protection for compilations of data.⁷⁴

Given this historical and political context, it may appear beneficial to traditional knowledge holders to broaden the classic justifications of intellectual property law in order to include traditional knowledge and “poor people’s knowledge.”⁷⁵ However, it is important to remember that many developing countries have objected to the global reach of intellectual property rights for various legitimate reasons. These include factors such as the increased cost and the reduced accessibility of goods, ranging from HIV medications to educational materials that are protected by intellectual property rights.⁷⁶ Further, it has yet to be conclusively shown that intellectual property rights actually stimulate economic development.⁷⁷ With this in mind, any new intellectual

73. For example, the inclusion of geographical indications in TRIPS represented the first time that this subject matter was acknowledged in a global agreement as a category of intellectual property. See TRIPS Agreement, *supra* note 6, at arts. 22, 23. Indications of sources were recognized in the *Lisbon Agreement for the Protection of Appellations of Origin and their International Registration*, 923 U.N.T.S. 205 (1958). However, this agreement has only 27 signatories. See *Lisbon Agreement for the Protection of Appellations of Origin and their International Registration: Objective and Main Features*, WIPO, <http://www.wipo.int/lisbon/en/general> (last visited Nov. 4, 2010).

74. *WIPO: Copyright Treaty*, adopted Dec. 20, 1996, 36 I.L.M. 65, art. 5 (1997). This is because compilations of data would not necessarily be able to receive copyright protection due to the requirement that there be some minimal creativity.

75. See, e.g., Madhavi Sunder, *The Invention of Traditional Knowledge*, 70 LAW & CONTEMP. PROBS. 97, 123–124 (2007).

76. J. H. Reichman, *The TRIPS Agreement Comes of Age: Conflict or Cooperation with the Developing Countries?*, 32 CASE W. RES. J. INT’L L. 441, 450–51 (Summer 2000) (noting developing country concerns about the costs associated with IP protection, including issues such as access to medicines); Margaret Chon, *Intellectual Property “from Below”: Copyright and Capability for Education*, 40 U.C. DAVIS L. REV. 803 (2007); DUTFIELD & SUTHERSANEN, *GLOBAL INTELLECTUAL PROPERTY LAW* 9 (Edward Elgar, 2008) (observing that intellectual property rights generally result in increased prices and a reduced access to knowledge).

77. Andrew W. Torrance & Bill Tomlinson, *Patents and the Regress of Useful Arts*, 10 COLUM. SCI. & TECH. L. REV. 130, 132, 166 (2009); see Jerome H. Reichman, *Intellectual Property in the Twenty-First Century: Will the Developing Countries Lead or Follow?*, 46 HOUS. L. REV. 1115, 1116–1118 (2009) (discussing how various nations attained high levels of

property right should be carefully contemplated and adequately justified, taking into consideration a balancing of rights and obligations.⁷⁸

Developing countries, seeing enhanced intellectual property laws as ill-suited to their levels of economic development, sought more relaxed intellectual property standards than those which were ultimately implemented in TRIPS.⁷⁹ Given that the contours of traditional knowledge are not well-defined, developing countries may be overconfident in the assumption that a *sui generis* traditional knowledge right will benefit them in the way that intellectual property rights have benefited some parts of the industrialized world. A *sui generis* intellectual property model to protect traditional knowledge will not eliminate the need to enforce and protect existing intellectual property rights. Nor will the problems of the current intellectual property system be corrected through the creation of a new right. Moreover, it may result in increased costs, including the need to pay to access the previously free cultural goods of others.

E. Reaching Agreement on an International Legal Instrument to Protect Traditional Knowledge

Reaching an agreement on the text of an international legal instrument to protect traditional knowledge is no small task. In this section of the paper, I will outline the WIPO mandate and progress on

economic growth without having strong intellectual property rights); see GOV'T ACCOUNTABILITY OFFICE, *INTELLECTUAL PROPERTY: OBSERVATIONS ON EFFORTS TO QUANTIFY THE ECONOMIC EFFECTS OF COUNTERFEIT AND PIRATED GOODS* 27 (2010) (observing that despite significant efforts, it is difficult to quantify the net effect of counterfeiting and piracy on the economy). But see Viktor Mayer-Schönberger, *The Law as Stimulus: The Role of Law in Fostering Innovative Entrepreneurship*, 6 J. L. & POL'Y FOR INFO. SOC'Y 153, 166–68 (2010) (arguing that the patent system overall tends to benefit entrepreneurs). See Rod Falvey, Neil Foster & David Greenaway, *Intellectual Property Rights and Economic Growth*, in *INTERNATIONALISATION OF ECONOMIC POLICY* 7–9 (2004) (showing a positive relationship between intellectual property protection and economic growth); see, e.g., Walter G. Park & Juan Carlos Ginarte, *Intellectual Property Rights and Economic Growth*, 15 CONTEMP. ECON. POL'Y 51 (1997) (stating that intellectual property rights indirectly affect economic growth).

78. See Robert L. Ostergard, Jr., *Economic Growth and Intellectual Property Rights Protection: A Reassessment of the Conventional Wisdom*, in *INTELLECTUAL PROPERTY, TRADE AND DEVELOPMENT: STRATEGIES TO OPTIMIZE ECONOMIC DEVELOPMENT IN A TRIPS-PLUS ERA*, 115, 118, 140–41 (Daniel Gervais ed., 2007).

79. Adebambo Adewopo, *The Global Intellectual Property System and Sub-Saharan Africa: A Prognostic Reflection*, 33 U. TOL. L. REV. 749, 754–69 (2002); CARLOS CORREA, *INTELLECTUAL PROPERTY RIGHTS, THE WTO AND DEVELOPING COUNTRIES* 3 (2000) (discussing how industrialized countries only sought strong intellectual property rights once they had attained a certain level of industrialization and economic development).

traditional knowledge discussions, including the apparent tensions between developing and developed countries.

WIPO's work on traditional knowledge began in 1998 with two roundtable discussions and nine fact-finding missions on traditional knowledge, innovation, and creativity.⁸⁰ The most recent WIPO IGC mandate, which was agreed upon by a consensus decision of the 184 WIPO member states, is a strong indication that some progress will be made on the international protection of traditional knowledge.⁸¹ The IGC is tasked with reaching agreement on the text of an international legal instrument to protect genetic resources, traditional knowledge, and traditional cultural expressions. The text is to be submitted to the WIPO General Assembly by 2011.⁸² The WIPO IGC held its first meeting under the new mandate in early December, 2009.⁸³

However, the discussions on this issue have been slow and difficult, with many national delegations expressing frustration at the lack of progress in creating an international framework for the protection of such knowledge.⁸⁴ This appears to be primarily due to substantial lack of agreement on the need to protect traditional knowledge, and perhaps, on the utility of addressing the concerns of traditional

80. WIPO, MATTERS CONCERNING INTELLECTUAL PROPERTY AND GENETIC RESOURCES, TRADITIONAL KNOWLEDGE AND FOLKLORE—AN OVERVIEW ¶¶ 29–30 WIPO Doc. WIPO/GRTKF/IC/1/3 (2001). WIPO's involvement on expressions of folklore dates back to its 1978 work with UNESCO on model provisions for national laws to protect folklore; WIPO IGC, MATTERS CONCERNING INTELLECTUAL PROPERTY AND GENETIC RESOURCES, TRADITIONAL KNOWLEDGE AND FOLKLORE 3, WIPO Doc. WO/GA/26/6 (2000).

81. See WIPO, IGC RESUMES SUBSTANTIVE WORK, WIPO Doc. PR/2009/625 (2009), available at http://www.wipo.int/pressroom/en/articles/2009/article_0058.html.

82. WIPO IGC, MATTERS CONCERNING THE INTERGOVERNMENTAL COMMITTEE ON INTELLECTUAL PROPERTY AND GENETIC RESOURCES, TRADITIONAL KNOWLEDGE AND FOLKLORE, WIPO Doc. WO/GA/38/9 (2009). The text is to be based on existing WIPO documents, with three documents to provide the basis for the committee's work: WIPO/GRTKF/IC/9/4, WIPO/GRTKF/IC/9/5, WIPO/GRTKF/IC/11/8A (Traditional Cultural Expressions, Traditional Knowledge and Genetic Resources). According to the schedule included in the mandate, the WIPO General Assembly meeting is to take place in September 2011.

83. WIPO, IGC RESUMES SUBSTANTIVE WORK, WIPO Doc. PR/2009/625 (2009), available at http://www.wipo.int/pressroom/en/articles/2009/article_0058.html (after the first meeting, further discussion on the composition of inter-sessional working groups, their mandates, and various related matters was still required); WIPO, WIPO MEMBER STATES ADVANCE WORK ON TRADITIONAL KNOWLEDGE, FOLKLORE AND GENETIC RESOURCES, WIPO Doc. PR/2010/639 (2010), available at http://www.wipo.int/pressroom/en/articles/2010/article_0012.html (update showing IGC progress).

84. WIPO IGC, REPORT ¶¶ 13, 19, 22–29, 32, 34, 37, 38, 42, 242, WIPO Doc. WIPO/GRTKF/IC/14/12 (2009).

knowledge holders by creating new legal rights.

Developing countries tend to support traditional knowledge protection while the industrialized countries are more hesitant. For instance, in its response to a 2007 WIPO questionnaire, the United States conveyed its reluctance to move forward on international legal protection for traditional knowledge.⁸⁵ The United States expressed the view that it was premature to discuss various matters relating to the protection of traditional knowledge. These included the term of protection, possible limitations and exceptions, and sanctions and penalties.⁸⁶ In contrast, the *Bandung Declaration* of the New Asian African Strategic Partnership submitted to WIPO that same year by Indonesia stresses the “urgent need to expedite the establishment of international legally binding instruments” to protect traditional knowledge, including *sui generis* mechanisms.⁸⁷

In an attempt to breach the apparent impasse, the African Group submitted a proposal to the 14th session of the WIPO IGC.⁸⁸ In this June 2009 proposal, the African Group seeks a legally binding international instrument for the protection of traditional knowledge. The proposal summarizes the general positions of the WIPO member States, categorizes them into groups and then provides the African Group’s suggestion for moving forward.⁸⁹ The summary reflects the lack of consensus on matters ranging from the definition of traditional knowledge, to issues such as whom should be the beneficiaries of any such protection and whether there is actually a need for an international regime to protect this subject matter.⁹⁰ This underscores the need for a solid policy rationale for its protection, and one that makes sense in respect of intangible goods.

85. The United States is seen as one of the primary opponents to an international regime to protect TK. See Paul Kuruk, *Goaded a Reluctant Dinosaur: Mutual Recognition Agreements as a Policy Response to the Misappropriation of Foreign Traditional Knowledge in the United States*, 34 PEPP. L. REV. 629, 683–86 (2007).

86. WIPO IGC, TRADITIONAL CULTURAL EXPRESSIONS/EXPRESSIONS OF FOLKLORE AND TRADITIONAL KNOWLEDGE, COMMENTS OF THE UNITED STATES OF AMERICA 5–7, 12–4 (2007), available at http://www.wipo.int/export/sites/www/tk/en/igc/pdf/usa_tk-tce.pdf (responses to Questions 5, 6, and 8).

87. WIPO, BANDUNG DECLARATION ON THE PROTECTION OF TRADITIONAL CULTURAL EXPRESSIONS, TRADITIONAL KNOWLEDGE, AND GENETIC RESOURCES ¶ 8, WIPO Doc. WIPO/GRTKF/IC/11/12 (2007) (submitted by Indonesia).

88. WIPO, AFRICAN GROUP SUBMISSION ON WIPO/GRTKF/IC/13/9, WIPO Doc. WIPO/GRTKF/14/9 (2009).

89. *Id.* at Annex I, page 1.

90. WIPO, AFRICAN GROUP SUBMISSION ON WIPO/GRTKF/IC/13/9, WIPO Doc. WIPO/GRTKF/14/9 (2009).

II. JUSTIFYING INTANGIBLE PROPERTY RIGHTS

A. *Classic Approaches to Intellectual Property Law*

Unlike physical property, the boundaries of abstract objects are exclusively determined by the law that creates property rights in intangible goods. Thus, such property rights create exclusivity where none would otherwise exist. As intangible goods, intellectual creations are non-rivalrous and non-excludable.⁹¹ Intellectual property is considered a public good because it is not diminished by additional uses.⁹² It is therefore important to have a solid policy rationale for any legal regime that creates property in intangible goods. I will briefly outline the main justifications for intellectual property rights, which can be described as natural rights theories and utilitarian or incentive theories.⁹³

According to natural rights theory, the creator deserves protection for his intellectual creations because he has mixed his labor with what previously belonged to the commons and is therefore entitled to his just desserts.⁹⁴ Utilitarian justifications for intellectual property protection tend to be based on the goal of promoting economic efficiency, or providing incentives for innovation despite the costs that may be associated with creating new products. This is particularly true for industrial property.⁹⁵

91. Michael A. Carrier, *Cabining Intellectual Property Through a Property Paradigm*, 54 DUKE L.J. 1, 32 (2004); CHRISTOPHER MAY, A GLOBAL POLITICAL ECONOMY OF INTELLECTUAL PROPERTY RIGHTS: THE NEW ENCLOSURES 3–4 (2d ed. 2010).

92. WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW 13–14 (2003).

93. The relatively new “social planning theory” approach to IPRs has as its underlying idea the need for intellectual property protection to be part of planned attempt to create rules that “advance a vision of a just and attractive culture.” See, eg., William Fisher, *Theories of Intellectual Property*, in NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY 175 (Stephen R. Munzer ed., 2001).

94. See JANICE M. MUELLER, PATENT LAW 28–29 (Vicki Been et al. eds., 3d ed. 2009) (discussing natural rights theory). Another natural rights approach, more closely associated with civil law systems, treats intellectual property as a type of moral right linked to the creator’s personhood. Moral rights theory tends to be more commonly used to justify copyright protection. For example, international copyright law recognizes the author’s moral right to have the work attributed to her and not to have the work altered without consent. See WIPO, BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS, art. 6 *bis* (Paris Act of July 24, 1971 as am. Sept. 28, 1979) (1886) [hereinafter *Berne Convention*]; Visual Artists Rights Act of 1990, 17 U.S.C. §106A (2006) (limited moral rights provision for intentional or grossly negligent destruction of a visual artwork).

95. Trademarks, for example, are thought to help consumers make more economically efficient choices by relying on the marks to distinguish the source of goods. Trademark laws serve the public good insofar as they reduce confusion and misleading practices in the market place. They also encourage the production of high quality products to be used in association

It has been suggested that the utilitarian justification of providing incentives for innovation is, though not perfect, perhaps the strongest justification for intellectual property rights.⁹⁶ Society agrees to protect certain intangible goods not only for the benefit of the producers but also for the benefit of the users and the public in general. Intellectual property rights are part of a social contract—an exchange between the inventor or creator and the public.⁹⁷ This is a good starting point from which to assess intellectual property law in terms of its public purpose, but it has its limitations. The modern discourse on intellectual property often focuses on innovation and creativity as the utilitarian goals of intellectual property policy.⁹⁸ Unfortunately, the other social benefits that intellectual property law should generate tend to be overlooked.⁹⁹ It is useful to go beyond a predominantly economic focused utilitarian approach in order to create space for the consideration of other goals, such as access to affordable knowledge goods.¹⁰⁰

B. An Instrumentalist Approach

Property rights in intangible goods can affect the distribution of

with the mark. Patents, for example, provide an incentive for commercializing new inventions to compensate for the costs involved in developing and bringing a new product to the market. Moreover, they decrease secrecy and increase the pool of knowledge that is available to society. See WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW* 294 (2003). Patenting requires that the invention be disclosed such that a skilled third party could reproduce the invention, thereby leading to the dissemination of knowledge. Patents can thus be said to curtail the desire to keep inventions secret. See TRIPS Agreement, *supra* note 6, at art. 29.1; U.S. Patent Act, 35 U.S.C. §111, 112 (requiring that the patent application contain a specification, with a written description of the invention, as well as an explanation of how to make and use the invention “in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains . . . to make and use the same”).

96. Edward C. Hettinger, *Justifying Intellectual Property*, 18 *PHILOSOPHY & PUBLIC AFFAIRS*, 31, 47–48 (Winter 1989).

97. See, e.g., JANICE M. MUELLER, *PATENT LAW* 30–31 (Vicki Been et. al. eds., 3d ed. 2009). Though this explanation is often used to explain patent law, it is applicable to other forms of intellectual property as well.

98. Professor Long suggests that, though intellectual property has been justified on the basis of natural law, labor theory, and personality theory, the TRIPS Agreement has established the theory of utilitarianism, and trade utilitarianism in particular, as the single international philosophy of intellectual property rights. See Doris Estelle Long, “*Democratizing*” *Globalization: Practicing the Policies of Cultural Inclusion*, 10 *CARDOZO J. INT’L & COMP. L.* 217, 243 (2002).

99. See Margaret Chon, *Intellectual Property and the Development Divide*, 27 *CARDOZO L. REV.* 2821, 2831 (2006) (observing that there has been a focus on the wealth maximizing function of intellectual property).

100. *Id.* at 2823, 2858 (suggesting that intellectual property should be responsive to development paradigms and advocating a principle of substantive equality).

power in favor of the rights holders.¹⁰¹ This is because certain abstract objects relate to physical or knowledge resources upon which many may depend.¹⁰² The push to protect traditional knowledge can be characterized, in part, as a response to the perceived unequal distribution of power.¹⁰³ This is largely due to the expansion of developed country standards for intellectual property protection for all countries without regard to their differing levels of development.¹⁰⁴ The traditional knowledge narrative appears to be partly driven by a desire for a more equitable international intellectual property system, one that is seen to value the contributions of both the developed and the developing world.¹⁰⁵

Professor Drahos proposes an instrumentalist approach to intellectual property, which considers the social costs of intellectual property protection.¹⁰⁶ He characterizes intellectual property rights as “liberty-intruding privileges of a special kind,” which can lead to factionalism and to a concentration of private power.¹⁰⁷ It follows that if intellectual property is considered from a distributive justice perspective, the scope of these rights should be limited.¹⁰⁸ This approach strives to achieve more than a simple cost-benefit analysis and conceives

101. PETER DRAHOS, A PHILOSOPHY OF INTELLECTUAL PROPERTY 158–59 (1996); CHRISTOPHER MAY, A GLOBAL POLITICAL ECONOMY OF INTELLECTUAL PROPERTY RIGHTS: THE NEW ENCLOSURES 68 (2d ed. 2010) (explaining that there is a disparity in power between the owners of intellectual property and the social groups who may benefit from more openness).

102. PETER DRAHOS, A PHILOSOPHY OF INTELLECTUAL PROPERTY 158–59 (1996). Examples include resources such as seeds, genes, forms of medical treatment, and chemical compounds.

103. David Castle & E. Richard Gold, *Traditional Knowledge and Benefit Sharing: From Compensation to Transaction*, in ACCESSING AND SHARING THE BENEFITS OF THE GENOMICS REVOLUTION 65, 67 (Peter W.B. Phillips & Chika B. Onwuekwe eds., 2007); David Skillman & Christopher Ledford, *Limiting the Commons with Uncommon Property: A Critique of Chander & Sunder’s “The Romance of the Public Domain,”* 8 OR. REV. INT’L L. 337, 340–41, 347 (2006).

104. David Skillman & Christopher Ledford, *Limiting the Commons with Uncommon Property: A Critique of Chander & Sunder’s “The Romance of the Public Domain,”* 8 OR. REV. INT’L L. 337, 340–41, 347 (2006).

105. David Castle & E. Richard Gold, *Traditional Knowledge and Benefit Sharing: From Compensation to Transaction*, in ACCESSING AND SHARING THE BENEFITS OF THE GENOMICS REVOLUTION 65, 67 (Peter W.B. Phillips & Chika B. Onwuekwe eds., 2007).

106. PETER DRAHOS, A PHILOSOPHY OF INTELLECTUAL PROPERTY 213–214, 223 (1996).

107. *Id.* at 5.

108. Indeed, rather than viewing intellectual property law as creating rights, Professor Drahos suggests that the narrative should shift to intellectual property law as granting privileges, that are accompanied by corresponding duties. *See id.* at 200.

of intellectual property as a means to an end.¹⁰⁹ Utilizing this model, intellectual property law would be developed with a view to achieving objectives that are based on some moral value. Though instrumentalism is not linked to any particular moral value, its humanist orientation would lead to a consideration of distributive justice theories.¹¹⁰

If the traditional knowledge dialogue is partially a response to the deleterious effects of TRIPS, then a distributive justice analysis of traditional knowledge may be relevant to the traditional knowledge narrative. Treating intellectual property as a means to an end, one might ask whether a traditional knowledge right will achieve the goal of more equity, or, for the purposes of this paper, whether it will result in access to affordable knowledge goods. Global intellectual property law has been criticized as reflecting a top-down approach to intellectual property regulation and one that is based on the needs and objectives of wealthy states.¹¹¹ Asking whether a traditional knowledge right supports a particular equity oriented outcome serves as a useful framework for analyzing property rights in intangible goods. It also allows for a consideration of some of the concerns of developing countries, knowledge users, and the poor.

From a development perspective, Professor Chon suggests that a distributive justice approach, which focuses on the needs of users in both developed and developing countries for accessible and affordable knowledge goods may respond to the imbalance in the global regime.¹¹² As Professor Chon points out, distributive justice can be approached from an economic perspective or a political perspective. It may also involve a consideration of the relationship between the production of knowledge goods and other social goods such as public health or education.¹¹³ On the global scale, this may lead one to query how best to ensure the intellectual property balance such that the inequities of the global trading system are not exacerbated.¹¹⁴

1. The International Treaties Support a Balanced Approach

Given the international nature of the traditional knowledge debate, some consideration should be given to the global view of intellectual

109. PETER DRAHOS, *A PHILOSOPHY OF INTELLECTUAL PROPERTY* 213–214, 223 (1996).

110. *Id.* at 214–215.

111. *Id.* at 805.

112. Margaret Chon, *Intellectual Property “from Below”: Copyright and Capability for Education*, 40 U.C. DAVIS L. REV. 803, 805, 813 (2007).

113. *Id.* at 809.

114. *Id.* at 810.

property rights as reflected by the major multilateral intellectual property agreements. Although they are always born of compromise, the treaties represent the best approximation of the collective views of the states that have endorsed them.

The language of the international treaties, which reflects the need to balance the rights of users and producers, supports a distributive justice approach to international intellectual property law. The balancing function of the intellectual property regime may be characterized as a question of distributive justice because it requires a consideration of which social group is entitled to intellectual property protected knowledge goods.¹¹⁵ The *Berne Convention* and the *Paris Convention*, for example, contain various limitations and exceptions to intellectual property rights to prevent the abuse of the limited monopoly and to allow users to access the work even if it is subject to property rights.¹¹⁶ Similarly, TRIPS provides for limited exceptions to the rights conferred by copyright, patent, and trademark.¹¹⁷ These provisions aim to ensure not only that the public domain is enhanced, but also that intellectual property law contributes to the social and economic needs of society.¹¹⁸

115. *Id.* at 806.

116. See e.g., *Paris Convention for the Protection of Industrial Property* art. 5A(2), 5C(1) (1883) [hereinafter *Paris Convention*] (Article 5A(2) allows for the compulsory licensing of patents under certain circumstances and Article 5C(1) of the *Paris Convention* allows countries to cancel the registration of a mark if it goes unused without any reasonable justification on the part of the right holder. Article 5A(2) provides that “[e]ach country of the Union shall have the right to take legislative measures providing for the grant of compulsory licenses to prevent the abuses which might result from the exercise of the exclusive rights conferred by the patent, for example, failure to work.” Article 5C(1) states that “[i]f, in any country, use of the registered mark is compulsory, the registration may be cancelled only after a reasonable period, and then only if the person concerned does not justify his inaction.” In copyright law, Article 9 of the *Berne Convention* allows *Berne* members to provide in their national laws for the reproduction of protected works “in certain special cases,” on the condition that the reproduction “does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.”).

117. TRIPS Agreement, *supra* note 6, at art. 30, provides for limited exceptions to the patent right, art. 17 provides for limited exception to the rights conferred by trademark, and art. 13 provides for limited exceptions to the rights conferred by copyright.

118. The term “public domain” as used in this article refers to works that are not subject to intellectual property rights. Works that are protected under intellectual property law but subject to certain limited exceptions to the rights conferred would not, in the context of this piece, be considered works in the “public domain.” I recognize that some eminent scholars, such as Professor Boyle, use the term “public domain” to encompass those areas of free access within intellectual property law. See James Boyle, *THE PUBLIC DOMAIN: ENCLOSING OF THE COMMONS OF THE MIND* 38–39 (2008). The aspects of traditional knowledge that are currently debated are those that fall within the public domain insofar as they are not subject to intellectual property rights at all. Thus, I discuss the exceptions to intellectual property rights as an element of the balancing function of intellectual property

Even more pertinent to the discussion about excluded subject matter, is the international recognition that not all forms of knowledge *should* fall within the ambit of intellectual property law. For instance, TRIPS enshrines the established principle that copyright law extends to the expression of an idea, but not to the idea itself.¹¹⁹ Further, with a view to protecting public health and morality, WTO members may exclude diagnostic, therapeutic, and surgical methods from patentability.¹²⁰ Additionally, the policy objective of curtailing monopolies on language means that generic words are not protectable as trademarks.¹²¹ In other words, there may be policy reasons for preventing some types of knowledge from being subject to property rights.

Finally, TRIPS, which incorporates by reference the main provisions of the *Berne Convention* and the *Paris Convention*, explicitly acknowledges in Articles 7 and 8 the importance of a balanced intellectual property regime.¹²² Article 7 states:

The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, *to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations* [emphasis added].¹²³

This is consistent with a distributive justice analysis of intellectual property law as well as with the notion that intellectual property policy should serve some broader public good.¹²⁴

The arguments about equity and fairness that are raised in the context of the traditional knowledge narrative reinforce the need to take the distributive justice aspects of intellectual property policy into account in determining the appropriate model for the protection of

policy rather than as part of the public domain.

119. TRIPS Agreement, *supra* note 6, at art. 9.2. Procedures, methods of operation, and mathematical concepts are also excluded from protection.

120. *Id.* at art. 27.3. In addition, art. 27.2 of TRIPS allows WTO members to exclude certain inventions from patentability in order to protect public health and morality.

121. *Id.* at art. 15–17; *Paris Convention*, *supra* note 116, at art. 6 quinquies.

122. Article 8 of TRIPS incorporates the flexibility for WTO member states to implement measures to protect public health and to “promote the public interest in sectors of vital importance to their socio-economic and technological development.” TRIPS Agreement, *supra* note 6, at art. 8.

123. *Id.* at art. 7.

124. See Peter K. Yu, *The Objectives and Principles of the TRIPS Agreement*, 46 HOUS. L. REV. 979 (2009).

traditional knowledge.

III. A TRADITIONAL KNOWLEDGE RIGHT

A. *The Objectives of Traditional Knowledge Protection*

This section of the paper compares the objectives and rationale for traditional knowledge protection to those for intellectual property. In so doing, the aim is to consider whether, given some of the stated objectives for traditional knowledge protection, an intellectual property model is suitable. Some commentators view a *sui generis* intellectual property regime as a necessity.¹²⁵ Others have suggested that it may make sense for traditional knowledge to be protected as intellectual property due to broad similarities between the two.¹²⁶

The view that this knowledge should be treated as intellectual property is reflected in public statements made by certain indigenous groups. For example, the 1993 *Mataatua Declaration on Cultural and Intellectual Property Rights of Indigenous Peoples*¹²⁷ reaffirmed the undertaking of United Nations Member States to “[a]dopt or strengthen appropriate policies and/or legal instruments that will protect indigenous intellectual and cultural property and the right to preserve customary and administrative systems and practices”¹²⁸ Similarly, the 1992 *Indigenous Peoples Earth Charter*¹²⁹ contains various provisions on traditional knowledge, including a statement indicating that it should be considered a crime to usurp traditional knowledge and medicines, and a request that “our right to intellectual and cultural properties be guaranteed and that the mechanism for its implementation be in favor of our peoples, and studied in depth and implemented.”¹³⁰

125. Lorna Dwyer, *Biopiracy, Trade, and Sustainable Development*, 19 Colo. J. INT’L ENVTL. L. & POL’Y 219, 249–52 (Summer 2008).

126. Peter K. Yu, *Cultural Relics, Intellectual Property, and Intangible Heritage*, 81 TEMP. L. REV. 433, 448–53 (Summer 2008).

127. COMM’N ON HUMAN RIGHTS SUB-COMM’N OF PREVENTION OF DISCRIMINATION AND PROT. OF MINORITIES WORKING GROUP ON INDIGENOUS POPULATIONS, THE MATAATUA DECLARATION ON CULTURAL AND INTELLECTUAL PROPERTY RIGHTS OF INDIGENOUS PEOPLES (1993). The conference was convened by the Nine Tribes of the Mataatua in New Zealand and attended by more than 140 delegates from fourteen countries.

128. *Id.* at 1.

129. Kari-oca Conference, Appendix 5 (May 25–30, 1992) [hereinafter IPEC].

130. *Id.* ¶¶ 99, 102. Other traditional knowledge related statements can be found in paragraphs 28 and 96 of the IPEC. With respect to the criminalization of the taking of traditional knowledge, the notion that the illegal taking should be considered a crime is not a concept that is foreign to intellectual property law. Indeed, TRIPS, Article 61 requires the criminalization of trademark counterfeiting or copyright piracy that takes place “on a

The WIPO draft provisions on traditional knowledge and traditional cultural expressions consist of general principles and objectives. A review of the draft provisions reveals that the international community is yet to address traditional knowledge protection in a specific and definitive way. However, since one of the options is to treat it as a new form of intellectual property, I will next discuss the areas where the goals of traditional knowledge and intellectual property may overlap and where they may diverge or conflict.

1. Commonality between the Policy Objectives of Intellectual Property and Traditional Knowledge

I identify the right to exclude others, economic incentives, and innovation as three potentially shared objectives of traditional knowledge and intellectual property.

a. Exclusion

Intellectual property rights prevent others from making use of the protected creation without the consent of the right holder. This is similar to the protection sought for traditional knowledge insofar as traditional knowledge holders seek to prevent others from making use of their intangible goods without consent.¹³¹ However, because the right holder is clearly identified in the intellectual property context, the excluded other is also well defined. In the traditional knowledge context, it may not be clear precisely whom is the “other” to be excluded.¹³² This is because the boundaries of the category for traditional knowledge holder are amorphous.¹³³

b. Economic Rationale

Some traditional knowledge holders may be opposed to commercializing goods that have been created from the use of traditional knowledge and genetic resources because they consider it sacred.¹³⁴ Thus, even if permission were sought to use the traditional

commercial scale.”

131. Among the objectives of traditional knowledge protection is the requirement for prior informed consent. *See infra* note 140.

132. See the discussion of “indigenous person” at section III (B) of the paper.

133. Indeed, it may not be possible to create clear boundaries, particularly if, as discussed in the paper, not all indigenous persons are traditional, and not all traditional persons are indigenous.

134. Peter K. Yu, *Cultural Relics, Intellectual Property, and Intangible Heritage*, 81 TEMP. L. REV. 433, 455 (Summer 2008); WIPO IGC, DECLARATION OF SHAMANS ON INTELLECTUAL PROPERTY AND PROTECTION OF TRADITIONAL KNOWLEDGE AND GENETIC RESOURCES ¶ 2, WIPO Doc. WIPO/GRTKF/IC/2/14 (2001).

knowledge, it may well be refused.¹³⁵

Still, not all traditional knowledge would fall into this category. According to the *Mataatua Declaration*, for example, indigenous peoples should be the sole owners of their cultural and intellectual property.¹³⁶ However, they are willing to share this knowledge as long as they can define and control its use.¹³⁷ Some traditional knowledge holders have expressed the view that they should be entitled to any patent rights arising from the use of their knowledge, as well as the ability to prevent any unauthorized taking of their genetic resources.¹³⁸ Thus, protecting traditional knowledge does not necessarily imply that such knowledge could not be utilized in commercial channels, provided the traditional knowledge producing communities could exercise control over its use.

Equitable benefit sharing is another goal that reflects the economic objectives of traditional knowledge protection.¹³⁹ The objective is to

135. Peter K. Yu, *Cultural Relics, Intellectual Property, and Intangible Heritage*, 81 TEMP. L. REV. 433, 457 (Summer 2008); WIPO IGC, DECLARATION OF SHAMANS ON INTELLECTUAL PROPERTY AND PROTECTION OF TRADITIONAL KNOWLEDGE AND GENETIC RESOURCES ¶ 2, WIPO Doc. WIPO/GRTKF/IC/2/14 (2001).

136. COMM'N ON HUMAN RIGHTS SUB-COMM'N OF PREVENTION OF DISCRIMINATION AND PROT. OF MINORITIES WORKING GROUP ON INDIGENOUS POPULATIONS, THE MATAATUA DECLARATION ON CULTURAL AND INTELLECTUAL PROPERTY RIGHTS OF INDIGENOUS PEOPLES 1-2 (1993) (declaring that "Indigenous Peoples of the world have the right to self determination and in exercising that right must be recognised as the exclusive owners Of their cultural and intellectual property . . .").

137. See, e.g., COMM'N ON HUMAN RIGHTS SUB-COMM'N OF PREVENTION OF DISCRIMINATION AND PROT. OF MINORITIES WORKING GROUP ON INDIGENOUS POPULATIONS, THE MATAATUA DECLARATION ON CULTURAL AND INTELLECTUAL PROPERTY RIGHTS OF INDIGENOUS PEOPLES 1-2 (1993); (recognizing that "Indigenous Peoples are capable of managing their traditional knowledge themselves, but are willing to offer it to all humanity provided their fundamental rights to define and control this knowledge are protected by the international community . . .").

138. WIPO IGC, DECLARATION OF SHAMANS ON INTELLECTUAL PROPERTY AND PROTECTION OF TRADITIONAL KNOWLEDGE AND GENETIC RESOURCES ¶¶ 7, 15, WIPO Doc. WIPO/GRTKF/IC/2/14 (2001).

139. WIPO IGC, THE PROTECTION OF TRADITIONAL KNOWLEDGE: REVISED OBJECTIVES AND PRINCIPLES, WIPO Doc. WIPO/GRTKF/IC/9/5 (2006). This is one of the documents that will serve as the basis of discussion for an international instrument to protect traditional knowledge. The enumerated policy objectives are as follows: recognize value, promote respect, meet the actual needs of traditional knowledge holder, promote conservation and preservation of traditional knowledge, empower holders of traditional knowledge and acknowledge the distinctive nature traditional knowledge systems, support traditional knowledge systems, contribute to safeguarding traditional knowledge, repress unfair and inequitable uses, concord with relevant international agreements and processes, promote innovation and creativity, ensure prior informed consent and exchanges based on mutually agreed terms, promote equitable benefit-sharing, promote community development and legitimate trading activities, preclude the grant of improper intellectual property rights to unauthorized parties, enhance transparency and mutual confidence, and complement

“promote the fair and equitable sharing and distribution of monetary and non-monetary benefits arising from the use of traditional knowledge.”¹⁴⁰

In addition to the objectives outlined by WIPO, the language in international instruments, such as the *Convention on Biological Diversity* (“CBD”) and the *International Treaty on Plant Genetic Resources* provide further evidence that there is some interest in commercializing traditional knowledge, or at least sharing in the economic benefits derived therefrom.¹⁴¹ For example, the CBD Article 8(1)(j) encourages an “equitable sharing of the benefits” arising from the use of traditional knowledge.¹⁴² Article 15(5) of the CBD requires State parties to obtain prior informed consent before accessing genetic resources.¹⁴³ The wide support for these treaties, as evidenced by the number of signatories, suggests that there are a significant number of nations whose indigenous stake-holders support the idea of prior informed consent and equitable benefit sharing if a product based on traditional knowledge is commercialized.

It seems reasonable to conclude therefore that part of the policy rationale underlying the protection of traditional knowledge is commercial. Traditional knowledge is said to play an important role in

protection of traditional cultural expressions.

140. *Id.* at 4. A closely related objective of traditional knowledge protection is to ensure that prior informed consent for the use of the knowledge is obtained on mutually agreed terms. *See id.*

141. *Convention on Biological Diversity* (with annexes), concluded at Rio de Janeiro on June 5, 1992, [hereinafter CBD] 1760 UNTS 79; 31 ILM 818 (1992) (as of this writing, the United States has signed but not ratified the CBD), *available at* <http://www.cbd.int/convention/parties/list/>. The Preamble of the CBD expressly recognizes “the close and traditional dependence of many indigenous and local communities embodying traditional lifestyles on biological resources, and the desirability of sharing equitably benefits arising from the use of traditional knowledge, innovations and practices”; Food and Agricultural Organization, *International Treaty on Plant Genetic Resources for Food and Agriculture*, (2002) [hereinafter ITPGR] (as of this writing, the United States has signed but not ratified the ITPGR), *available at* <http://www.fao.org/legal/treaties/033s-e.htm>. The CBD and the ITPGR have provisions relating to intellectual property rights, traditional knowledge and access to genetic materials.

142. CBD, *supra* note 141, at art. 8(j) provides: “Subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices.”

143. *Id.* at art. 15(5) provides: “Access to genetic resources shall be subject to prior informed consent of the Contracting Party providing such resources, unless otherwise determined by that Party.”

the global economy, with the market value of plant-based medicines sold in developed countries estimated to be worth billions.¹⁴⁴ Also, some indigenous groups may view their traditional knowledge as private property that is capable of commercialization.¹⁴⁵ Thus, the commercial nature of intellectual property law is not necessarily incompatible with traditional knowledge protection.

Despite this common commercial aspect, the economic objective of traditional knowledge is related to the sharing of benefits from the commercialization of such knowledge rather than as a way to recoup the costs associated with commercialization. The traditional knowledge objective of equitable benefit sharing would be consistent with a development-focused distributive justice approach to intellectual property. This would move away from the main distributive economic aspect of classical intellectual property law, which aims to distribute the costs of innovation and commercialization.¹⁴⁶ This classical intellectual property economic distribution serves to create incentives for innovation. By comparison, traditional knowledge aims to achieve a more equitable outcome in the sense that the benefits arising from the use and commercialization of the property are shared. Thus, the underlying economic policy justifications remain somewhat distinct from one another. This emphasizes the importance of the equity seeking distributive justice elements to traditional knowledge.

c. Innovation

One could list innovation as another shared policy objective of intellectual property rights and a traditional knowledge right. Intellectual property policy aims to stimulate innovation, and thereby the development of new intangible goods. Traditional knowledge protection is also supposed to promote innovation and creativity and to enhance the transmission of traditional knowledge within indigenous and traditional communities.¹⁴⁷

At the same time, the innovation intellectual property seeks to

144. Graham Dutfield, *TRIPS-Related Aspects of Traditional Knowledge*, 33 CASE W. RES. J. INT'L L. 233, 243–44 (Spring 2001).

145. *See id.* (noting that the market valued of plant based medicines was estimated to be \$61 billion in 1990).

146. Margaret Chon, *Distributive Justice and Intellectual Property: Intellectual Property "from Below": Copyright and Capability for Education*, 40 U.C. DAVIS L. REV. 803, 808 (2007) (noting that from an economic perspective, distributive justice may require the allocation of resources among social groups).

147. WIPO IGC, THE PROTECTION OF TRADITIONAL KNOWLEDGE: REVISED OBJECTIVES AND PRINCIPLES 4, WIPO Doc. WIPO/GRTKF/IC/9/5 (2006).

promote and the innovative aspects of traditional knowledge differ in some respects. Traditional knowledge is described as innovative insofar as it is constantly evolving in response to a changing environment.¹⁴⁸ This responsive evolution could be described as adaptive rather than innovative. Intellectual property seeks to incentivize innovations and creations that are new or independently created, even though they may build upon the prior works of others.¹⁴⁹ Admittedly, most patents are granted on minor improvements and copyright law does not require that a work be innovative, only that it be original. This supports the position that traditional knowledge is no less innovative than patentable or copyrightable subject matter. Yet, it is precisely because some traditional knowledge could not meet the requirements for intellectual property protection that a *sui generis* right has been proposed. It seems reasonable to conclude therefore, that innovation may be a partially shared objective, but that the concept of innovation in the traditional knowledge context is broader than in intellectual property law. Thus, the threshold for innovation in the traditional knowledge context may be lower.

2. Equity-Oriented Goals as a Major Distinction

The fairness aspect of the traditional knowledge narrative underscores the distinction between the aims of intellectual property and traditional knowledge. Traditional knowledge has been characterized as representing intangible *developing* country goods while intellectual property protects intangible *developed* country goods.¹⁵⁰ Part of the logic underlying the argument in favor of an intellectual property type protection for traditional knowledge is that if the developed countries can protect their intangible goods, commercialize them and benefit economically, developing countries should be entitled to the same treatment for their intangible goods. This may help explain why some traditional knowledge proponents seek a *sui generis* regime for what some describe as intellectual property in traditional knowledge.¹⁵¹

148. WIPO IGC, TRADITIONAL KNOWLEDGE: OPERATIONAL TERMS AND DEFINITIONS 11, WIPO Doc. WIPO/GRTKF/IC/3/9 (2002).

149. See TRIPS Agreement, *supra* note 6; Universal Declaration of Human Rights, *infra* note 166.

150. *Id.*; see Madhavi Sunder, *The Invention of Traditional Knowledge*, 70 LAW & CONTEMP. PROBS. 97, 112 (Spring 2007).

151. WIPO IGC, DECLARATION OF SHAMANS ON INTELLECTUAL PROPERTY AND PROTECTION OF TRADITIONAL KNOWLEDGE AND GENETIC RESOURCES ¶ 15, WIPO Doc. WIPO/GRTKF/IC/2/14 (2001); UNESCO Symposium on the protection of traditional knowledge and expressions of indigenous cultures in the Pacific Islands, Noumea, 15-19

Intellectual property seeks to promote the creation of new works to enrich the public domain. It also strives, through various exceptions, to maintain a balance between the rights of the user and the rights of the creator. By comparison, it seems that traditional knowledge advocates seek to protect the rights of traditional and indigenous communities essentially for reasons of equity. This may be because the problems of “bio-piracy” and misappropriation of traditional knowledge are not really about intellectual property *per se*. Rather, the debate seems to be, in large part, about the effects of a strong intellectual property regime in situations where there is a marked inequality of bargaining power. This can be characterized as a problem of commercial entities, academic institutions, or individuals taking advantage of and exploiting those who are less resourced or lack knowledge about the intellectual property regime.¹⁵² This is about the dynamics of power.

Generally speaking, the persons said to be traditional knowledge holders are in a relatively weak position compared to those who tend to be able to obtain intellectual property rights.¹⁵³ This may be due to differences in economic status, education, or knowledge about the intellectual property system. That said, would protecting traditional knowledge through a *sui generis* intangible property right create a more equitable, from a distributive justice perspective, intellectual property regime? What would be the public service function of an intangible property right in traditional knowledge? It has been posited that the protection of traditional knowledge serves the greater good because traditional knowledge holders will continue to innovate and that there is a strong link to the preservation of the environment, both physical and cultural.¹⁵⁴

February 1999 Final Declaration, UNESCO, available at <http://portal.unesco.org/culture/en/files/14264/10645002355Noumea1999.pdf/Noumea1999.pdf> (last visited Nov. 4, 2010).

152. See, e.g., Graham Dutfield, *TRIPS-Related Aspects of Traditional Knowledge*, 33 CASE W. RES. J. INT'L L. 233, 271 (Spring 2001) (observing that patent law tends to favor corporate interests, even when it is to the detriment of traditional peoples); See Letter From David Hirschmann, President and Chief Exec. Officer, Global Intellectual Property Center of the United States Chamber of Commerce, *To the President of the United States* (Feb. 16, 2010), available at <http://www.theglobalipcenter.com/sites/default/files/documents/adminletter.pdf> (last visited May 10, 2010) (outlining the Chamber of Commerce agenda for the promotion and protection of American intellectual property rights through increased vigilance and enforcement activities).

153. Consider, for example, the intellectual property resources and economic resources of a small African ethnic group, such as the San people located in South Africa as compared to the resources of a research institution or a pharmaceutical company.

154. See generally Madhavi Sunder, *The Invention of Traditional Knowledge*, 70 LAW

However, as part of this equity-oriented discourse, the traditional knowledge right appears to be contemplated as a kind of natural right.¹⁵⁵ A focus on intangible property as a kind of natural right, deriving from Locke's labor theory, can result in an imbalanced intellectual property system. This is because intellectual property, as a natural right, achieves a status that allows it to take priority over other competing interests.¹⁵⁶ Thus, the use of an intellectual property model to protect traditional knowledge may not be consistent with the delicate balance that intellectual property law seeks to achieve. Ultimately, this could be detrimental not only to the broader public but also to the traditional knowledge holders themselves.

Yet, it should be possible to have an international intellectual property system that does not enable sophisticated, complex users of intellectual property laws to take advantage of indigenous and local communities or others who could be considered to be in a position of relative disadvantage. This objective should be feasible without creating new intangible property rights. Instead of creating more intellectual property rights, it may be more effective to take an instrumentalist approach to intellectual property—one that aims to attain certain social goods. Among these could be a more equitable human development-oriented interaction between intellectual property law and less resourced persons.¹⁵⁷

Two examples of the equity seeking objectives of a traditional knowledge right are the protection of cultural heritage and the promotion of value and respect.

a. Protecting Cultural Heritage

It is not surprising that intellectual property law is inadequate to protect all forms of traditional knowledge. Although some intangible cultural goods can be protected under intellectual property law, and copyright law in particular, the protection of intangible cultural goods and classical intellectual property have different objectives and serve fundamentally different purposes.¹⁵⁸ One seeks to protect cultural

& CONTEMP. PROBS. 97 (Spring 2007).

155. I say this in the sense that traditional knowledge seems to be heavily influenced by the human rights-related concerns of traditional knowledge holders.

156. PETER DRAHOS, *A PHILOSOPHY OF INTELLECTUAL PROPERTY* 200–01 (1996).

157. I use the term “disadvantaged person” to refer to those who are disadvantaged in relation to the intellectual property system either due to economics, education, or for historical or cultural reasons.

158. Since copyright protects literary artistic works, it could be said to protect intangible cultural goods to the extent that these creations are considered cultural property.

heritage, while the other seeks to promote creativity, innovation, efficiency and commercialization.¹⁵⁹ Control over cultural goods, heritage, and expressions is not considered to be the primary objective of intellectual property protection.¹⁶⁰ Rather, at this time, the predominant rationale for intellectual property rights is to stimulate innovation and creativity.

b. Promoting Value and Respect

Policy objectives for the protection of traditional knowledge include aims such as recognizing the value of traditional knowledge and promoting respect for such knowledge.¹⁶¹ In addition, traditional knowledge holders aim to repress unfair and inequitable uses, safeguard the knowledge, and promote community development.¹⁶² It is immediately apparent that some of the objectives of traditional knowledge protection are based on a desire to promote respect for the traditional knowledge source communities and the development of such communities. However, creating property rights in traditional knowledge is not necessarily essential to recognizing its social value. Indeed, some of the most valuable knowledge cannot receive intellectual property protection, precisely because of its value.¹⁶³

Similar value promoting objectives are found in the 2003 UNESCO *International Convention for the Safeguarding of the Intangible Cultural Heritage*¹⁶⁴ ("UNESCO Convention") and were likely carried over into

For example, certain cultural songs, paintings, or books may be subject to copyright protection. Geographical indications may be a form of intellectual property that can be used to protect elements of culture.

159. Various scholars have observed the inconsistency between the objective of protecting cultural property and the goals of intellectual property policy. See SUSAN SCAFIDI, WHO OWNS CULTURE?: APPROPRIATION AND AUTHENTICITY IN AMERICAN LAW 17–19 (2005) (stating that the utilitarian policy objective of enriching the public domain is among the greatest barriers to the protection of cultural products); Christine H. Farley, *Protecting Folklore of Indigenous Peoples: Is Intellectual Property the Answer?*, 30 CONN. L. REV. 1, 55 (1997) (pointing out that, with respect to copyright law, what some traditional knowledge advocates seek is contrary to the goal of disseminating of information that copyright law seeks to encourage, and that it runs the risk of diminishing the public domain).

160. Whether intellectual property law has slowly been taking on a new role may be worthy of further consideration. See Barton Beebe, *Intellectual Property Law and the Sumptuary Code*, 123 HARV. L. REV. 810, 816–17 (2010) (arguing that intellectual property rights are increasingly used as an indication of authenticity).

161. WIPO IGC, THE PROTECTION OF TRADITIONAL KNOWLEDGE: REVISED OBJECTIVES AND PRINCIPLES 3, WIPO Doc. WIPO/GRTKF/IC/9/5 (2006).

162. *Id.* at 4.

163. For example, scientific theorems and mathematical principles are not patentable.

164. U.N. EDUC. SCI. & CULTURAL ORG. (UNESCO), Convention for the Safeguarding of the Intangible Cultural Heritage (2003) (signed by 118 states as of December

the WIPO forum from there. The definition of intangible cultural heritage is similar to that of traditional knowledge and would appear to cover much of the same subject matter.¹⁶⁵ The preamble to the UNESCO *Convention* refers to certain international instruments, including the *Universal Declaration on Human Rights*.¹⁶⁶ It goes on to recognize the importance of safeguarding the “intangible common heritage of humanity” and notes the absence of a binding multilateral agreement to protect intangible cultural heritage.

The UNESCO *Convention* requires State parties to take measures to safeguard intangible cultural heritage within their territories, and establishes policy and educational commitments for the State parties to undertake in order to do so.¹⁶⁷ However, it does not establish specific legal mechanisms for the protection of this heritage. Further, Article 3 of the UNESCO *Convention* provides that it should not be interpreted as affecting any rights or obligations under any international intellectual property conventions.¹⁶⁸ By comparison, WIPO has the task of creating effective legal protections for traditional knowledge.¹⁶⁹

If the ultimate goal is to shift the global intellectual property regime to one that is more favorable to the poor or to communities that have been disadvantaged by intellectual property laws, a *sui generis* traditional knowledge right may not be the most effective solution. Indeed, it could have the opposite effect.

2009 but notable exceptions include the United States, Canada, Australia, and New Zealand), available at http://portal.unesco.org/en/ev.php-URL_ID=17716&URL_DO=DO_TOPIC&URL_SECTION=201.html.

165. Article 2.1 of the Convention defines intangible cultural heritage as “the practices, representations, expressions, knowledge, skills— as well as the instruments, objects, artifacts and cultural spaces associated therewith— that communities, groups and, in some cases, individuals recognize as part of their cultural heritage. This intangible cultural heritage, transmitted from generation to generation, is constantly recreated by communities and groups in response to their environment, their interaction with nature and their history, and provides them with a sense of identity and continuity, thus promoting respect for cultural diversity and human creativity.” Examples of intangible cultural heritage listed in Article 2.2 of the Convention include oral traditions and expressions, performing arts, social practices, rituals and festive events, knowledge and practices concerning nature and the universe, and traditional craftsmanship. This broad definition would include most, if not all, of what has been defined as traditional knowledge and traditional cultural expressions at WIPO. *Id.*

166. United Nations, *Universal Declaration of Human Rights*, G.A. res 217A(III), U.N.Doc A/180 at 71 (1948).

167. UNESCO, Convention for the Safeguarding of the Intangible Cultural Heritage, art. 11, 13, 14 (2003).

168. *Id.* at art. 3.

169. Of course, since the negotiations are taking place outside of the WTO, it remains to be seen how any new agreement will intersect with WTO Members TRIPS obligations.

B. Traditional Knowledge Challenges

From a distributive justice perspective, traditional knowledge faces at least two difficulties in the attempt to receive an intellectual property type protection.

First, the introduction of a new intangible property right means a retraction, at least with respect to some traditional knowledge, of the public domain as it is currently understood.¹⁷⁰ This challenge requires traditional knowledge holders to provide a solid public policy rationale for limiting access to, and use of, such information. If a *sui generis* traditional knowledge right is to be created, the broader social good served by protecting traditional knowledge as a new form of intellectual property should be very clearly articulated.

Second, due to its intergenerational nature, it has been suggested that traditional knowledge should be protected indefinitely, and possibly retroactively.¹⁷¹ This has implications for the accessibility and affordability of the protected knowledge.

Third, traditional knowledge is linked to a people rather than to a concept that has been reduced to form by a single identifiable creator.¹⁷² This challenge is potentially a more significant one because it requires a demarcation of explicit cultural and ethnic lines in defining a property right. This task is further complicated by the fact that, contrary to what some traditional knowledge proponents seem to assume, every society has knowledge that has been handed down in one form or another. We are potentially all traditional knowledge holders of some kind.

1. The Public Domain as a Eurocentric Concept

It has been observed that much of what is considered traditional

170. Whether or not one links the concept of “public domain” to intellectual property, under the current international regime, there are no globally recognized proprietary rights in those forms of traditional knowledge that do not meet the criteria for protection under intellectual property law. Hence, from an intellectual property perspective, it is legally available to the public, provided that it has not been kept secret.

171. *Mataatua Declaration*, Recommendation 2; WIPO IGC, DECLARATION OF SHAMANS ON INTELLECTUAL PROPERTY AND PROTECTION OF TRADITIONAL KNOWLEDGE AND GENETIC RESOURCES ¶ 15, WIPO Doc. WIPO/GRTKF/IC/2/14 (2001); see Paul Kuruk, *Goaded a Reluctant Dinosaur: Mutual Recognition Agreements as a Policy Response to the Misappropriation of Foreign Traditional Knowledge in the United States*, 34 PEPP. L. REV. 629, 655 (2007); Graham Dutfield, *TRIPS-Related Aspects of Traditional Knowledge*, 33 CASE W. RES. J. INT’L L. 233, 251 (Spring 2001).

172. As WIPO has correctly observed, it is possible to have a group of rights holders. Such a group would normally be a collective of identifiable individuals. It is also possible to have a single entity having some public or official status as the right holder, in the case of certification marks, for example, that is the right holder for the entitled group.

knowledge is likely in the public domain.¹⁷³ Consequently, it could be problematic to attempt to assert property rights over such material.¹⁷⁴ Whereas intellectual property law generally seeks to prevent creations and innovations from falling into the public domain for a specified period, an international treaty on traditional knowledge may involve the creation of a new property right in information that is already publicly known or at least known by certain groups of people.¹⁷⁵

However, the view that rejects intellectual property rights for traditional knowledge on the basis that such rights would shrink the public domain has been criticized as Eurocentric.¹⁷⁶ For instance, some WIPO participants have expressed the view that the public domain is not a concept that was recognized by indigenous peoples and that expressions of folklore, for example, could not have entered the public domain if they were never protected as intellectual property.¹⁷⁷ These intangible cultural goods are regulated by customary law rather than by intellectual property law. Thus, some communities may consider traditional knowledge as falling outside the intellectual property concept of public domain.

Whether or not one acknowledges the concept of the public domain, if one accepts that knowledge is a public or communal good, then it is important to be cautious in creating laws that restrict access to this good. Further, the empirical data on the effect of intellectual property rights remains inconclusive, and the utility of strong intellectual property rights at all stages of a nation's economic development remains questionable.¹⁷⁸

173. WIPO IGC, TRADITIONAL CULTURAL EXPRESSIONS/EXPRESSIONS OF FOLKLORE AND TRADITIONAL KNOWLEDGE, COMMENTS OF THE UNITED STATES OF AMERICA 9 (2007), available at http://www.wipo.int/export/sites/www/tk/en/igc/pdf/usa_tk-tce.pdf. At its tenth session, the WIPO IGC identified ten key questions relating to the protection of TK, then sought comments on these issues from WIPO member states and interested parties between its tenth (November–December 2006) and eleventh (July 2007) sessions.

174. *Id.*

175. TRIPS Agreement, *supra* note 6, at arts. 12, 33 (term of protection for copyright and patent, respectively); *id.* at arts. 13, 27.3, 30 (limited exceptions to copyright and patent); see Madhavi Sunder, *The Invention of Traditional Knowledge*, 70 LAW & CONTEMP. PROBS. 97, 101 (2007).

176. Paul Kuruk, *Goaded a Reluctant Dinosaur: Mutual Recognition Agreements as a Policy Response to the Misappropriation of Foreign Traditional Knowledge in the United States*, 34 PEPP. L. REV. 629, 647–649 (2007).

177. WIPO IGC, THE PROTECTION OF TRADITIONAL CULTURAL EXPRESSIONS/EXPRESSIONS OF FOLKLORE: REVISED OBJECTIVES AND PRINCIPLES 40, WIPO Doc. WIPO/GRTKF/IC/9/4 (2006).

178. Andrew W. Torrance & Bill Tomlinson, *Patents and the Regress of Useful Arts*, 10 COLUM. SCI. & TECH. L. REV. 130, 132, 166 (2009); see FREDERICK M. ABBOTT, THOMAS

One could respond that all property rights, by definition, reduce accessibility. Further, it could be said that intellectual property rights generally lead to higher cost goods in order to allow producers to recoup rents. This may be true. This is also the reason why a solid policy rationale is required before new intellectual property rights are created. Moreover, it is not exclusively the public domain that should be considered but also the broader social good that intellectual property policy ideally supports.

If the objective sought can be achieved without creating a new property right, then it seems that alternative methods should be pursued—or at least thoroughly explored before creating the new right. More importantly, if a *sui generis* traditional knowledge right could also reduce access to affordable knowledge goods, including for developing country nationals and local or indigenous communities, then perhaps it is not the best defense against misappropriation and bio-piracy.

2. Perpetual Protection

A traditional knowledge right would not necessarily be circumscribed by a limited term of protection.¹⁷⁹ It is suggested that the protection should be indefinite and even retroactive to protect historical works.¹⁸⁰ This is one aspect of traditional knowledge protection that is clearly distinct from classical intellectual property law, and which emphasizes some of the inconsistencies between the policy objectives of intellectual property and traditional knowledge.

An important aspect of the intellectual property balance is that, for most intellectual property forms, the protection granted is time limited.¹⁸¹ Moreover, it can be observed that the term of protection is

COTTIER & FRANCIS GURRY, INTERNATIONAL INTELLECTUAL PROPERTY IN AN INTEGRATED WORLD ECONOMY 73–75 (2007).

179. WIPO, AFRICAN GROUP SUBMISSION ON DOCUMENT WIPO/GRTKF/IC/13/9 14, WIPO Doc. WIPO/GRTKF/IC/14/9 (2009); WIPO, THE PROTECTION OF TRADITIONAL KNOWLEDGE, DRAFT GAP ANALYSIS: REVISION 28, WIPO Doc. WIPO/GRTKF/IC/13/5(b) Rev. (2008); Graham Dutfield, *TRIPS-Related Aspects of Traditional Knowledge*, 33 CASE W. RES. J. INT'L L. 233, 251 (Spring 2001).

180. *Mataatua Declaration*, Recommendation 2; WIPO IGC, DECLARATION OF SHAMANS ON INTELLECTUAL PROPERTY AND PROTECTION OF TRADITIONAL KNOWLEDGE AND GENETIC RESOURCES ¶ 15, WIPO Doc. WIPO/GRTKF/IC/2/14 (2001); Paul Kuruk, *Goadng a Reluctant Dinosaur: Mutual Recognition Agreements as a Policy Response to the Misappropriation of Foreign Traditional Knowledge in the United States*, 34 PEPP. L. REV. 629, 655 (2007); Graham Dutfield, *TRIPS-Related Aspects of Traditional Knowledge*, 33 CASE W. RES. J. INT'L L. 233, 251 (Spring 2001).

181. More recently accepted forms of international intellectual property, such as geographical indications, are an exception to this principle of term limit. Though trademarks can be renewed indefinitely, subject to certain conditions, there is a term of protection

shorter for more restrictive rights. Thus, for example, the agreed upon minimum term of patent protection is twenty years from the date of the filing of the patent application.¹⁸² Patent protection is available only for a single invention, so if someone else develops the same invention, the patent will only go to one inventor.¹⁸³ Copyright, by comparison, results in a more limited monopoly.¹⁸⁴ Under the *Berne Convention*, the minimum copyright term for literary and artistic works is the life of the author plus fifty years.¹⁸⁵ However, copyright law allows for the same independent creation to be protected, provided it is not a copy of someone else's original work. In this sense, copyright is a less restrictive form of protection. The longer term of copyright protection is, therefore, less detrimental to society as compared to a lengthy patent term.

In other words, intellectual property law needs to be balanced so that the state granted monopoly over intellectual creations is not, ultimately, detrimental to the public. However, due to its intergenerational nature, traditional knowledge could be protected indefinitely and even retroactively. This may not be consistent with the equity-oriented objective of access to affordable traditional knowledge goods. Thus, any indefinite right granted should be relatively less restrictive in order not to offend the principle of a balance between the interests of the right holder and the public.¹⁸⁶

3. Identifying the Traditional or Indigenous Traditional Knowledge Producing Community

By definition, the protectable knowledge should be intergenerational, associated with a traditional or indigenous community, and integral to the cultural identity of the indigenous or

provided for trademarks. See TRIPS Agreement, *supra* note 6, at art. 18.

182. *Id.* at art. 33. For a patent to be granted the innovation must be new, useful and non-obvious. Once an innovation has been invented, the same invention can no longer meet the criteria for patent protection, and a second patent will not be granted. See *id.* at art. 27(1).

183. 35 U.S.C. § 102 (2006); TRIPS Agreement, *supra* note 6, at art. 27.1 (setting out requirement of novelty for patentability); 35 U.S.C. §§ 102 (g), 135 (provisions on interference).

184. See Copyright Act of 1976, 17 U.S.C. § 102 (provides that copyright subsists in "original works of authorship"—two individuals can individually paint the same scene and each will be entitled to copyright protection for her work).

185. *Berne Convention*, *supra* note 94, at art. 7(1); TRIPS Agreement, *supra* note 6, at art. 12.

186. For a more in depth discussion on this point, see J. Janewa OseiTutu, *Traditional Knowledge: Is Perpetual Protection a Good Idea?* 50 IDEA No. 4, 697 (2010).

traditional community who are the custodians of such knowledge.¹⁸⁷ At the same time, traditional knowledge is characterized as neither old, nor static.¹⁸⁸ It is constantly being revised, improved and regenerated. That said, is the difference between traditional knowledge and other knowledge primarily cultural? Who is this indigenous person or community for whom protection is sought? To whom does the benefit accrue when benefit sharing is implemented? Who should be compensated? This raises the question of not only the group identity, but is also relevant to the question of term of protection. For example, how far back in time should one look in order to correctly identify the beneficiaries?¹⁸⁹

WIPO does not define the groups that could be covered by any potential international treaty, or other legal instrument that may be eventually agreed upon by WIPO Member states. Many country delegations do, however, acknowledge the need for a definition.¹⁹⁰ For the purpose of defining the scope of the right, it would be preferable to have some basic definition of the potential right holder.¹⁹¹ Since it is possible, in some instances, to have group ownership of an intellectual property right, the communal nature of a traditional knowledge right is not necessarily a barrier to protection.¹⁹² Additionally, it has been pointed out that it is not accurate to say that traditional knowledge is always communal and that Western intellectual property is individual. The traditional knowledge may be in the hands of a select few, an exclusive group of men or women, and may not necessarily be widely held knowledge.¹⁹³ The right holder could, therefore, be a group. It is

187. WIPO IGC, TRADITIONAL KNOWLEDGE—OPERATIONAL TERMS AND DEFINITIONS 11, WIPO Doc. WIPO/GRTKF/IC/13/9 (2002).

188. WIPO ICG, REVIEW OF EXISTING INTELLECTUAL PROPERTY PROTECTION OF TRADITIONAL KNOWLEDGE 11, WIPO Doc. WIPO/GRTKF/IC/3/7 (2002).

189. There are several related questions that may arise with respect to identification and compensation, some of which may be too detailed to address in an international agreement. For example, will only those people who still live in the particular community or country, to the exclusion of those who moved out the community or to another country, be included among the rights holders? Would the right extend to persons who have a parent who is not part of the relevant traditional knowledge generating community? These are examples of the complex matters that would have to be addressed at some point—most likely at the national level. Thanks to Lisa P. Ramsey for highlighting some of these issues.

190. WIPO IGC, THE PROTECTION OF TRADITIONAL KNOWLEDGE: REVISED OBJECTIVES AND PRINCIPLES, art. 4, p. 22, WIPO Doc. WIPO/GRTKF/IC/9/5 (2006).

191. See, e.g., Robert W. Kastenmeier & Michael J. Remington, *The Semiconductor Chip Protection Act of 1984: A Swamp or Firm Ground*, 70 MINN. L. REV. 417 (1985).

192. See WIPO ICG, REVIEW OF EXISTING INTELLECTUAL PROPERTY PROTECTION OF TRADITIONAL KNOWLEDGE 12, WIPO Doc. WIPO/GRTKF/IC/3/7 (2002).

193. GRAHAM DUTFIELD & UMA SUTHERSANEN, *GLOBAL INTELLECTUAL PROPERTY LAW* 328 (2008).

not clear, however, how to identify the persons who would comprise this group.¹⁹⁴ In the intellectual property context, when the right holder is a group, the boundaries of the group are normally clearly delineated, and the group is usually comprised of a collection of identifiable individuals.¹⁹⁵

In 2007, the United Nations General Assembly adopted a *Declaration on the Rights of Indigenous People* (“DRIP”).¹⁹⁶ Unfortunately, the DRIP contains no definition of an indigenous person.¹⁹⁷ In any event, the meaning of indigenous person may be different in the traditional knowledge context than in other areas. Further, the term “indigenous” may have multiple meanings in the context of the traditional knowledge discussion.

In the absence of an agreed upon definition, I start by looking at a plain language meaning of the term.¹⁹⁸ The *Concise Oxford Dictionary* defines the term “indigenous” as meaning, “originating or naturally occurring in a particular place; native.”¹⁹⁹ This terminology has been utilized to describe the people European adventurers met at the lands they found. Hence, the peoples Europeans met in the Americas have been referred to as “natives” as have the peoples Europeans encountered when they voyaged to places such as India and Africa.

In an early study, WIPO took as a working definition of indigenous

194. See the discussion at section III of the paper.

195. See e.g., the U.S. Copyright Act of 1976, 17 U.S.C. §101 (2006) defines a “joint work” as the work of “two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole.”; see also U.S. Patent Act of 1952, 35 U.S.C. §111 (2009), which states that the inventor, or person authorized by the inventor, may apply for a patent; 35 U.S.C. §116 (2009), which provides that if there is more than one inventor, they shall jointly apply for the patent; 35 U.S.C. §118 (2009) (outlining circumstances where someone other than the inventor may file for patent protection).

196. United Nations, *Declaration on the Rights of Indigenous Peoples* (2007), available at <http://www.un.org/esa/socdev/unpfii/en/declaration.html> (Australia, Canada, New Zealand, and the United States voted against the adoption of the Declaration).

197. See PATRICK THORNBERRY, *INDIGENOUS PEOPLES AND HUMAN RIGHTS* 33 (2002).

198. In other fields of international law, including trade law, resort is made to the ordinary meaning of the words, including the use of dictionaries. In addition it is customary to resort to the *Vienna Convention on the Law of Treaties*, 1155 U.N.T.S. 331 (1969) (“a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”). The term “indigenous” could be interpreted in its context to refer to people who were colonized. However, for the purpose of illustrating the point about the implication of the definition for the scope of the right, I will make use of the simple dictionary definition of the word “indigenous.”

199. *CONCISE OXFORD DICTIONARY* (10th ed. 1999).

communities, peoples, and nations:

[T]hose which, having a historical continuity with ‘pre-invasion’ and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those countries, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identities, as the basis of their continued existence as peoples, in accordance with their own cultural pattern, social institutions, and legal systems.²⁰⁰

The term “traditional” or “indigenous” peoples, as it is used in the traditional knowledge discourse, appears to refer essentially to those persons who are not of European origin. However, the precise scope of persons who may be considered indigenous is not obvious from the WIPO materials relating to traditional knowledge, or from the literature on the protection of indigenous peoples and their cultural heritage. In the context of the traditional knowledge narrative it is not apparent that this term is limited to those persons described in Western dialogue as “Aboriginal” or “First Nations” in places such as Canada, Australia, and New Zealand, to the exclusion of African, Asian, and Latin American ethnic or ‘tribal’ groups.²⁰¹

Although there is no agreed upon definition of “indigenous” or “traditional” persons, the common thread that has been identified among the various definitions is the recognition that “a people’s deep, historical, ancestral roots to traditional lands as integral to indigeneity.”²⁰² While this may be a good starting point, the fact remains there is no global definition of indigenous peoples.²⁰³ This therefore creates a certain element of risk due to the difficulty in limiting the

200. WIPO, INTELLECTUAL PROPERTY NEEDS AND EXPECTATIONS OF TRADITIONAL KNOWLEDGE HOLDERS: WIPO REPORT ON FACT-FINDING MISSIONS ON INTELLECTUAL PROPERTY AND TRADITIONAL KNOWLEDGE (1998–1999), 23 (2001), available at <http://www.wipo.int/tk/en/tk/ffm/report/index/html>.

201. See Kristen A. Carpenter, Sonia K. Katyal & Angela R. Riley, *In Defense of Property*, 118 YALE L.J. 1022, 1103 (2009) (describing most of the world’s indigenous peoples as residing in the developing world).

202. *Id.* at 1034–35.

203. Siegfried Wiessner, *Indigenous Sovereignty: A Reassessment in Light of the UN Declaration on the Rights of Indigenous Peoples*, 41 VANDERBILT JRNL. TRANSNAT’L L. 1141, 1163 (2008) (noting the absence of definition of the term indigenous people in the United Nations *Declaration on the Right of Indigenous Peoples*, and explaining that many scholars have justified this lack of definition).

scope of a potential traditional knowledge property right.²⁰⁴ For instance, it has been proposed that the immediate beneficiaries of a traditional knowledge right should be the direct descendants of the traditional guardians of the knowledge.²⁰⁵ This would require an identification of not only the relevant community, but also the individuals within the community who are entitled to some kind of right in the traditional knowledge. Given the intergenerational nature of traditional knowledge, this could be quite a complex and daunting, although not impossible, task.

It may also be that the term “indigenous” or “traditional” implies a reference to aboriginal societies living traditional lifestyles as opposed to modern lifestyles. There are many difficulties in identifying and categorizing such a group, including the fact that it is rare to find peoples who are entirely “traditional.”²⁰⁶ When we entertain the Colombian suggestion that intellectual property rights should recognize the traditional knowledge of indigenous, “Afro-American” or local communities, the notion of an indigenous or traditional person can become quite broad.²⁰⁷ Guatemala considers itself to be a country with a majority population comprised of indigenous and traditional communities. Consequently, many of the creations of a given country could theoretically be protectable as traditional knowledge.²⁰⁸ Similarly, Asian countries have submitted to WIPO that they are “mostly rich in genetic resources, traditional knowledge and folklore”²⁰⁹

The various categories of intellectual property law are defined on the basis of the knowledge that is created. In this way, intellectual property rights are open to anyone whose innovation or creative work

204. *Id.*

205. *See Mataatua Declaration*, Recommendation 2.

206. I recall being struck by the sight of a Masai man walking through the streets of a small dusty town in Tanzania, wearing the telltale traditional bright Masai cloth and the traditional Masai footwear, listening to his iPod as he walked along, his cell phone tucked in his belt. Given that the Masai are essentially herdsman and cattle ranchers, he may depend on the land, and probably rears his cattle in accordance with traditional methods handed down from generation to generation. At the same time, he will likely have modern elements to his life, and may well make use of new technologies that are protected by intellectual property rights, such as mobile phones, to conduct business.

207. WIPO IGC, REPORT ¶ 29, WIPO Doc. WIPO/GRTKF/IC/14/12 (2009).

208. *Id.* ¶ 31; Siegfried Wiessner, *Indigenous Sovereignty: A Reassessment in Light of the UN Declaration on the Rights of Indigenous Peoples*, 41 VANDERBILT JRNL. TRANSNAT’L L. 1141, 1163 (2008) (observing that, while it is not consistent with his understanding of the term, some African nations claim that all Africans are indigenous).

209. WIPO IGC, POSITION PAPER OF THE ASIAN GROUP AND CHINA 1, WIPO Doc. WIPO/GRTKF/IC/2/10 (2001).

meets the criteria for protection.²¹⁰ Traditional knowledge is defined by the knowledge produced, which is to be handed down through the generations. It is further defined by the characteristics of the people who produce such knowledge. Traditional knowledge producers are described as “traditional” or “indigenous” peoples. As it has been characterized thus far, this new form of intangible property would be a form of protection that would *not* be available to all humanity.

An intangible property right that is, by definition, explicitly linked to ethnic identities raises a variety of issues which go beyond the scope of this paper. However, when one considers the meaning of traditional knowledge in the broadest sense, there are significant frailties in the distinction between non-indigenous information that is handed down through the generations and the intergenerational indigenous or traditional knowledge. The next section of this paper turns to a discussion of other kinds of intergenerational, or traditional, knowledge.

C. Other Intergenerational Knowledge Goods

1. Cultural Exchange

Culture is not static. Rather, various cultures interact to borrow from and influence one another.²¹¹ Depending on the level of exclusivity of a *sui generis* traditional knowledge right, one indigenous or traditional community could find that it is unable to make free use of traditional knowledge from another indigenous or traditional community. There is also the risk of a reduced availability of traditional knowledge to those within that traditional society who don't have rights of access. Furthermore, the current concept of traditional knowledge may be relatively easily broadened to include not only developing

210. I acknowledge there may be cost barriers to obtaining intellectual property rights.

211. Cultural exchange means that Asian arts such as acupuncture, Karate, and Yoga have become common in the Western world as well as throughout the developing world. Thus one can find Karate classes everywhere—from Africa to Europe to North America. Further, cultural migration and exchange lead to cultural traditions such as African American step dancing that are derived from African traditional dances. At the same time, young Africans have incorporated African American step dancing and hip hop dancing into their youth culture. See Olufunmilayo B. Arewa, *Piracy, Biopiracy and Borrowing: Culture, Cultural Heritage and the Globalization of Intellectual Property*, 20- 21 (Case Res. Paper Series in Legal Stud., Working Paper No. 04-19, 2006), available at <http://papers.ssrn.com/abstract=596921> (observing that to ignore the role of borrowing among cultures creates a static view of culture and that notions of piracy and biopiracy demonize borrowing); *id.* at 60-62 (“The potential complexities involved in establishing cultural boundaries are often ignored in public discourse about local knowledge,” and arguing that culture is not static and any “process of borrowing necessarily involves acts of appropriation.”).

country cultural heritage and knowledge but also the cultural heritage and knowledge of some European communities.

For example, methods of wine and cheese production tend to be based on cultural practices of European groups who could be considered “indigenous,” in the purest sense of the word, to their localities. The value Europeans place on their cultural food products is reflected in the European demand for increased international protection for geographical indications.²¹² In bi-lateral trade agreements, the European Union has also sought protection for “traditional expressions” for European wines.²¹³

The knowledge about the uses of the neem tree or turmeric may be valuable intergenerational knowledge. However, there are many other kinds of ancient knowledge, which appear to have been discounted. One might argue that if traditional knowledge is about power and inequality, a discussion that excludes the colonial context is not a true discussion at all.²¹⁴ In my view, it becomes a discussion about the characteristics of the knowledge and not about the characteristics of the generators of the knowledge. This allows the analysis to focus on the nature of the property, instead of the nature of the property owner.

The next section turns to a discussion of some common household items to illustrate that intergenerational knowledge is not necessarily exclusive to particular ethnic groups.

2. Vinegar and Silver as Examples

Vinegar and silver have been used for generations for their cleansing or healing properties, the knowledge of which comprises intergenerational knowledge. It may seem somewhat extreme to consider the uses of vinegar as traditional knowledge. This may be because its uses date back so far, or perhaps because it has become so

212. See TRIPS Agreement, *supra* note 6, at arts. 22–24 (provisions on geographical indications); Daniel Gervais, *The Lisbon Agreement's Misunderstood Potential* (The WIPO Journal, Working Paper No. 10-21, 2009) (discussing renewed interest in the Lisbon Agreement and the relationship between geographical indications and appellations of origin); Irene Calboli, *Expanding the Protection of Geographical Indications of Origin Under TRIPS: “Old” Debate or “New” Opportunity?*, 10 MARQ. INTELL. PROP. L. REV. 181, 182 (2006).

213. See, e.g., *Canada and the European Community on Trade in Wine and Spirits Agreement* (Sept. 16, 2003), available at <http://www.agr.gc.ca/itpd-dpci/ag-ac/4971-eng.htm>; *Agreement Between the European Community and Australia on Trade in Wine* (Dec. 1, 2008) (replaces 1994 Agreement).

214. Dorothy E. Roberts, *Why Culture Matters to Law: the Difference Politics Makes* in CULTURAL PLURALISM, IDENTITY POLITICS, AND THE LAW, AUSTIN SARAT & THOMAS R. KEARNS, EDS. 83 (University of Michigan Press, 1999) (noting that culture matters to law and that apparently neutral legal principles that purport to disregard culture effectively privilege the existing dominant cultural norms)

commonly used globally—having spread from one culture to another—that it does not immediately strike one as intergenerational cultural knowledge or traditional knowledge.

Well known for its preservative, antiseptic and cleansing properties, vinegar has been used for generations in various capacities. According to the recorded history of vinegar, the Babylonians used it as far back as several thousand years ago to preserve and pickle food. The ancient Greek, Hippocrates, subsequently prescribed vinegar to fight infections and various illnesses.²¹⁵ Similarly, the ancient Greeks, Romans and others used silver to keep water pure.²¹⁶ The Greeks apparently discovered the health benefits of silver, noting that those with silver canteens did not get sick.²¹⁷ Silver continues to be used in a medical capacity for its antibacterial properties.²¹⁸

Credit is perhaps due to the Greek tribes for our modern day knowledge of the health benefits of vinegar and silver. If this ancient knowledge is not protectable as a form of intangible property, is it because it is too old, even though the uses continue to evolve, or because the Greeks are not “indigenous”? Is it because such knowledge has become part of the common heritage of humankind? If this knowledge had been protectable, what would our modern day uses of vinegar and silver look like? Might all non-Greeks need to seek permission for certain uses? If so, this kind of system could easily lead, it seems, to the excessive concentration of power through control over intangible goods. Even if this would not have been the result, it is not apparent what would have been the benefit to the global public—to humankind—had such knowledge been treated as a form of intangible property. Using an instrumentalist analysis, one might ask what would be the objective sought and how it would serve the distributive justice goals of ensuring access to affordable knowledge goods.

The question then becomes whether the reasons for creating a new

215. ENZYME FACTS, <http://www.enzyme-facts.com/vinegar-history.html> (last visited Sept. 18, 2010); VINEGAR WORKS WONDERS, <http://www.vinegarworkswonders.com/history.asp> (last visited Sept. 18, 2010); VINEGAR HISTORY: HOW THE ANCIENTS BENEFITTED FROM VINEGAR, <http://www.apple-cider-vinegar-benefits.com/vinegar-history.html> (last visited Sept. 18, 2010).

216. OVERVIEW OF SILVER, <http://www.burnsurgery.com/Modules/silver/section1.htm> (last visited Sept. 18, 2010).

217. See generally *The Historical Uses of Silver* (April 17 2008), available at <http://colloidal-silver-solution.blogspot.com/2008/04/historical-uses-of-silver.html>; LOIS N. MAGNER, A HISTORY OF MEDICINE 8 (2d ed. 2005).

218. Shan Bergin & Paul Wraight, *Silver Based Wound Dressings and Topical Agents for Treating Diabetic Foot Ulcers*, THE COCHRANE DATABASE OF SYSTEMATIC REVIEWS. (Jan. 2006).

right make sense in the context of intellectual property law and whether a property right is a good solution if there are other alternatives available. In my view, because traditional knowledge seems to be primarily about equity, the solution should focus on achieving a more equitable intellectual property outcome. This can be done through means other than the creation of new property rights. On the other hand, one might observe that property rights are linked to power and equality. However, if the distinction between traditional or indigenous peoples and non-traditional peoples fails to achieve clarity in an international instrument, I query whether more equality is likely to be achieved. For example, will indigenous and local people improve their economic condition or have increased access to affordable knowledge goods?

If traditional knowledge is primarily about the dynamics of inequality, a new intellectual property style right is a poor solution. First, traditional knowledge seems to be partially a response to the overreach of the intellectual property system. Second, I query the efficacy of addressing what appears to be partly an issue of human rights and political inequality through the use of an intellectual property model. This is particularly so in light of the reasons for having intellectual property rights and some of the problems that may be associated with them. Third, the overreach of intellectual property law is not limited to developing countries and poor people.²¹⁹ The defects of the intellectual property system from a traditional knowledge perspective should be characterized not as a North-South issue but as an excessive intellectual property rights issue. This does not mean that intellectual property rights do not have a disparate impact on certain groups, nor does it mean that this disparate impact should go unacknowledged. However, the better solution is to curtail the intellectual property system, not to expand it.

The potentially broad category of rights holders, combined with the possibility of perpetual protection make a *sui generis* traditional knowledge right likely to increase the cost while decreasing the accessibility of traditional knowledge goods. Creating more property rights in intangibles is not necessarily beneficial for the global public,

219. *Ass'n for Molecular Pathology v. USPTO*, 702 F. Supp. 2d. 181 (S.D.N.Y. 2010) ("Myriad Genetics") (The court invalidated patents held by Myriad genetics that pertain to testing for a genetic predisposition to breast cancer. The plaintiffs included the Association for Molecular Pathology, the American College of Medical Genetics, the American Society for Clinical Pathology, the College of American Pathologists, various individual scientists, medical professional, and patients who were in need of the testing. The decision has been appealed.).

nor consistent with a distributive justice approach to global intellectual property law. Developing country nationals, many of whom struggle to pay the costs for patented medicines or copyrighted works may find that they suddenly have to pay for items, including those of European origin, which they had not conceptualized as traditional knowledge.²²⁰ For example, how would one distinguish an Italian claim to the method of preparing espresso or cappuccino from other culture-based claims? If the preparation of espresso could be considered an innovation handed down from generation to generation, there is no clear reason why it could not be considered traditional knowledge. There is no simple solution to this problem, nor do I purport to have the answers. However, if the problem is reframed as an issue of the fair and equitable treatment of traditional and indigenous peoples, rather than as a matter of intellectual property law per se, it may help to advance the dialogue.

IV. ADDRESSING THE PROBLEM

A. *The Need for a Balanced System*

In addition to those who have raised concern over issues such as bio-piracy, some scholars have observed that there is a current imbalance in the intellectual property regime.²²¹ Others have emphasized the dangers of overprotecting intellectual property and the harm that results from a shrinking public domain.²²² Professor Boyle, for example, points out that the expansionist intellectual property agenda has upset the fundamental balance between intellectual property and the public

220. SUSAN SCAFINDI, WHO OWNS CULTURE?: APPROPRIATION AND AUTHENTICITY IN AMERICAN LAW 99–100 (2005) (discussing a television narrative about the Italian origin of food products such as cappuccino and espresso, which are now commonly found in coffee shops around the world). Though this is a fictional account, it is illustrative of the difficulty in limiting what is considered traditional knowledge.

221. See RICHARD A. SPINELLO & MARIA BOTTIS, A DEFENSE OF INTELLECTUAL PROPERTY RIGHTS 1–4 (Edward Elgar ed., 2009) (describing the extensive scholarly criticisms of the excesses of the IP regime and noting that, though the entire IP system should not be overhauled, there is a need for balance and reform); Anupam Chander & Madhavi Sunder, Symposium: *Forward: Is Nozick Kicking Rawls's Ass? Intellectual Property and Social Justice*, 40 U.C. DAVIS L. REV. 563, 574–77 (Mar. 2007) (advocating a social justice approach to intellectual property, which would take into account a range of human values beyond an incentive theory approach to intellectual property).

222. JAMES BOYLE, THE PUBLIC DOMAIN: ENCLOSING THE COMMONS OF THE MIND 8–9 (2008) (explaining that intellectual property law does not necessarily work as it should, but sometimes does the exact opposite, becoming “a kind of perpetual corporate welfare—restraining the next generation of creators instead of encouraging them”); James Boyle, *The Second Enclosure Movement and the Construction of the Public Domain*, 66 LAW & CONTEMP. PROBS. 33, 37–41 (2003) (describing the expansion of intellectual property rights); LAWRENCE LESSIG, THE FUTURE OF IDEAS (2001).

domain.²²³ The faulty assumption underlying the promotion of increasingly strong intellectual property rights is that this will lead to more progress. However, it is by maintaining a balance that we are best able to achieve the goals of a healthy intellectual property system.²²⁴

On the other hand, it has been suggested that the benefits of open access go to the wealthy and powerful.²²⁵ As a matter of distributive justice, this supports the need for some form of global protection for traditional knowledge. The question is whether a *sui generis* intellectual property right is the solution. The traditional knowledge dialogue appears to be primarily about the relationship between the knowledge that is protected by intellectual property law and that which is not.²²⁶ In essence, the way in which the intellectual property regime intersects with traditional knowledge and facilitates what is seen as the unfair use of this knowledge can be identified as a significant part of the problem.

If one approaches international intellectual property ‘from below,’ the system should, arguably, be modified to ensure that the concerns of developing countries and indigenous peoples are addressed. Developing countries have already found the global expansion of minimum standards difficult to contend with and, in some cases, expensive to implement.²²⁷ Moreover, from a public policy perspective,

223. James Boyle, *A Manifesto on WIPO and the Future of Intellectual Property*, 2004 DUKE L. & TECH REV. 0009, 2 (2004).

224. *Id.* at 11 (encouraging a return to the “rational roots of intellectual property rather than an embrace of its recent excesses”).

225. Madhavi Sunder, *The Invention of Traditional Knowledge*, 70 LAW & CONTEMP. PROBS. 97, 106 (2007).

226. The problem seems to be not just that intellectual property rights are unavailable for all kinds of traditional knowledge. Rather, there is some level of discontent about the ability of persons and entities external to the knowledge generating community to obtain intellectual property rights over traditional knowledge based goods. This explains the use of the term “bio-piracy.”

227. Rochelle Cooper Dreyfuss & Andreas F. Lowenfeld, *Two Achievements of the Uruguay Round: Putting TRIPS and Dispute Settlement Together*, 37 VA. J. INT’L L. 275, 302 (1997) (“Now that there is time to be more reflective, we should recognize that as far as developing countries are concerned, the TRIPS Agreement could have a substantially different impact from the remainder of the WTO agreements. One effect is obvious: the cost to member states of enforcing intellectual property rights is formidable. Monitoring is expensive, the obligation to destroy infringing materials entails high social costs, and countries with weak civil justice systems must spend the money to create them. All of this is in addition to the cost of setting up copyright, trademark, and patent offices and staffing them with trained personnel. Even after these costs are borne, the TRIPS Agreement may present a significant problem to developing countries.”); J.H. Reichman, *Enforcing the Enforcement Procedures of the TRIPS Agreement*, 37 VA. J. INT’L L. 335, 348–49 (1997) (“[D]eveloping countries face real difficulties in overcoming technological lag at socially acceptable costs, and most of the benefits they may derive from implementing the substantive standards will take time to accrue.”).

there should be a balancing of rights and an assessment of the public benefit.²²⁸ A more balanced system would provide protection for rights holders while ensuring adequate protections for users. A more equitable system would recognize and respect the contributions of non-Western cultures, as well as the interests of individuals, vis-à-vis large corporations or institutions.

The citizens of the *demandeur* states may, despite the interest of these governments in protecting traditional knowledge, ultimately not benefit if an intangible intellectual property style right for traditional knowledge becomes globally recognized. If the goal in protecting traditional knowledge is to ensure that indigenous and traditional peoples experience social and economic gains, advocating traditional knowledge as beneficial for developing countries and indigenous communities, on the assumption that developing but not developed countries are rich in intergenerational knowledge and culture, may be a risky proposition.

1. Beyond the North-South Framework

The desire for an international regime to protect traditional knowledge may be part of a negotiating strategy in response to developing country demands for stronger intellectual property rights. The trade-off would be that the developed countries would be required to protect traditional knowledge in exchange for enhanced intellectual property laws.²²⁹ In other words, the developed countries have, through TRIPS, obtained protection for their intellectual goods, and developing countries seek to do the same, both as a defensive and offensive strategy, in response to TRIPS.²³⁰ The perception exists at WIPO that

228. Peter K. Yu, *The Objectives and Principles of the TRIPS Agreement*, 46 HOUS. L. REV. 979, 1004–05, 1007 (2009) (discussing the balancing aspects of the TRIPS Agreement).

229. Paul Kuruk, *Goaded a Reluctant Dinosaur: Mutual Recognition Agreements as a Policy Response to the Misappropriation of Foreign Traditional Knowledge in the United States*, 34 PEPP. L. REV. 629, 689–92 (2007) (observing that developing countries have sought to negotiate traditional knowledge protection at the WTO in exchange for higher levels of IP protection based on the principle of reciprocity, and advocating this negotiating strategy as a fair one given the sacrifice made by developing countries to implement TRIPS for the benefit of developed countries); see Graham Dutfield, *TRIPS-Related Aspects of Traditional Knowledge*, 33 CASE W. RES. J. INT'L L. 233, 271 (Spring 2001); Peter K. Yu, *Cultural Relics, Intellectual Property, and Intangible Heritage*, 81 TEMP. L. REV. 433, 482–83 (Summer 2008).

230. Madhavi Sunder, *The Invention of Traditional Knowledge*, 70 LAW & CONTEMP. PROBS. 97, 111–12 (Spring 2007); see Jerome H. Reichman, *The TRIPS Agreement Comes of Age: Conflict or Cooperation with the Developing Countries?*, 32 CASE W. RES. J. INT'L L. 441, 451–52 (Summer 2000) (noting the concern the benefits of higher levels of intellectual property protection are unevenly distributed to the detriment of developing countries, while developing country proposals for a new form of intellectual property to protect traditional

the developed countries are interested in justifying international agreements aimed at strengthening or harmonizing international intellectual property norms, while resisting any attempt to address traditional knowledge protection, which is primarily a developing country concern.²³¹

However, bio-piracy, the misappropriation of genetic resources, and the issue of control over genetic information extend beyond the context of traditional knowledge.²³² In other words, the underlying problems that inform the traditional knowledge discussion are not limited to developing countries or indigenous peoples.²³³

In the United States, for example, there have been various instances of litigation arising from genetic research. The cases concern issues similar to those raised in the traditional knowledge narrative. These include the matter of prior informed consent and the ability of the persons providing the genetic materials to retain control over the use of such materials and any associated intellectual property rights arising from the research.²³⁴ Thus, in the context of genetic research, there have been discussions about community rights versus individual rights in

knowledge were not well received).

231. See generally WIPO IGC, REPORT, WIPO Doc. WIPO/GRTKF/IC/14/12 (2009); Graham Dutfield, *TRIPS-Related Aspects of Traditional Knowledge*, 33 CASE W. RES. J. INT'L L. 233, 273 (Spring 2001) (observing that solutions to prevent misappropriation have more to do with human rights than IP rights).

232. For a discussion of the problem as it relates to the control of genetic information, see THE GOVERNANCE OF GENETIC INFORMATION: WHO DECIDES? (Heather Widdows & Caroline Mullen eds., 2009).

233. I acknowledge that, due to power imbalances, developing country nationals and indigenous groups are more susceptible to unfair treatment by commercial entities.

234. See *Moore v. Regents of the Univ. of Cal.*, 793 P.2d 479 (Cal. 1990) (plaintiff complained that his physicians failed to disclose pre-existing research and economic interests in his cells before extracting them); *Greenberg v. Miami Children's Hosp. Research Inst., Inc.*, 264 F. Supp. 2d 1064 (S.D. Fla. 2003) (plaintiffs sought to control the uses of genetic materials taken for research purposes, and from which a gene was isolated, a test developed and a patent obtained); *Havasupai Tribe v. Ariz. Bd. of Regents*, 204 F.3d 1063 (Ariz. Ct. App. 2008) (the Havasupai tribe filed suit after discovering that their genetic materials were being used for purposes for which they had not given their consent. The proceedings are ongoing. The Association of Molecular Pathology, American College of Medical Genetics, American Society for Clinical Pathology, and College of American Pathologists challenged the validity of the Myriad patents on the BRCA1 and BRCA2 genes. The Myriad patents are allegedly interfering with further breast cancer research and treatments and have been challenged as contrary to the U.S. Constitution, the First Amendment free speech right, and the Fourteenth Amendment); see *Ass'n for Molecular Pathology v. USPTO*, 702 F. Supp. 2d 181 (S.D.N.Y. 2010) (this case is illustrative of the controversy that surrounds gene patents in general, and those related to medical and health issues in particular). Clearly, it is not only developing countries and disenfranchised peoples who may benefit if the intellectual property system is corrected to ensure that intellectual property rights are beneficial rather than harmful.

controlling information, as well as questions about how best to share the benefits arising from the use of the research.²³⁵

The objective of controlling genetic materials and preventing companies from obtaining patent rights in such materials is not unlike the desire of traditional knowledge holders to control the use of the genetic resources found on their lands. Like human genetic materials, the spiritual or cultural aspects of traditional knowledge are not currently protected under the law. In other words, developing countries and traditional or local peoples are not the only complainants. The tensions in the intellectual property regime can be seen in a variety of situations, even within developed countries.²³⁶ A distributive justice analysis of intellectual property that gives greater weight to the user-oriented social goods may assist in correcting the imbalance in both industrialized and industrializing countries.

2. A Question of Justice

The protection of traditional knowledge may be seen as not only an intellectual property issue, but also as a trade and human rights issue.²³⁷

235. See, e.g., Søren Holm, *Me, Myself, I—Against Narcissism in the Governance of Genetic Information*, in *THE GOVERNANCE OF GENETIC INFORMATION: WHO DECIDES?* 37 (Heather Widdows & Caroline Mullen eds., 2009) (discussing whether the individual, the family, or the state should retain control over genetic information); see also, Heather Widdows, *Constructing Communal Models of Governance: Collectives of Individuals or Distinct Ethical Loci?*, in *THE GOVERNANCE OF GENETIC INFORMATION: WHO DECIDES?* 75, 84–85 (Heather Widdows & Caroline Mullen eds., 2009). The matter of the taking of the genetic materials of indigenous groups has been raised in the genetic information debate as well. However, the discussion is not with respect to cultural property, nor intellectual property rights, but rather the question of fairness and informed consent.

236. Patents related to genetic materials and life forms are not without controversy. Some countries have decided not to grant patents on life forms. For example, the Supreme Court of Canada decided that the Harvard onco-mouse was not patentable subject matter under Canadian law. See *Harvard Coll. v. Canada* (Commissioner of Patents), [2002] 4 S.C.R. 45 (Can.).

237. Stephen J. Munzer & Kal Raustiala *The Uneasy Case for Intellectual Property Rights in Traditional Knowledge*, 27 *CARDOZO ARTS & ENT. L.J.* 37, 48 (“[T]he contemporary debate about TK centers on economically subordinate groups, almost always indigenous peoples, and the movement of their understanding or skill to economically more powerful Western (or Westernized) groups or nations.”); WIPO IGC, REPORT ¶ 30, WIPO/GRTKF/IC/14/12 (2009). I acknowledge that intellectual property rights have sometimes been characterized as human rights based on Article 27 of the Universal Declaration on Human Rights. United Nations, *Universal Declaration of Human Rights*, G.A. res. 217A(III), U.N.Doc A/180 (1948). However, Intellectual Property rights are generally treated a property rights, rather than human rights. Further, Articles 27(1) and (2) of the Universal Declaration on Human Rights recognize a right for all persons to enjoy the benefit of scientific and literary creations, while at the same time acknowledging the right of the creator to the material and moral interests in his or her work. This would be consistent with a balanced approach to intellectual property protection rather than a creator-focused

The justifications for an international traditional knowledge instrument tend to highlight the rights of the affected population to protect its culture, heritage and dignity. This right-holder centered approach may be logical in the context of a human rights framework where the primary policy objective is the protection of the individual's personhood, dignity and liberty.²³⁸ Nevertheless, it may not be suitable within an intellectual property framework. It may also be an indication of weaknesses in international norms regulating rights of groups marginalized globally, and which would be more appropriately addressed in other multilateral settings.

A human rights framework for intellectual property, based in part of the *Universal Declaration of Human Rights*, has been proposed, but such framework remains to be fully developed.²³⁹ In any event, it would require a consideration of the rights of both users and producers of intangible goods.²⁴⁰ The *raison d'être* for intellectual property rights should not merely be the protection of the right holder, but also the various public goods intellectual property policy seeks to achieve.

Intellectual property law strives to maintain a balance between the public good of access and the free movement of information with the need to protect creators and innovators. It does so with a view to stimulating further creative activity. A predominantly creator-focused approach, which is the approach some traditional knowledge proponents tend to take, leads to an intangible rights regime that is tilted heavily in favor of the right holder.²⁴¹ This appears to be the same

approach to intellectual property protection.

238. Even such rights may be limited when, in the context of hate speech, for example, there is a risk of harm to the public.

239. Laurence R. Helfer, *Towards a Human Rights Framework for Intellectual Property*, 40 U.C. DAVIS L. REV. 971, 1015–20 (2007) (proposes the use of a human rights framework in approaching the traditional knowledge debate. Professor Helfer suggests that a human rights framework could be used in three possible ways: 1) to expand intellectual property rights, 2) to impose external limits on intellectual property, or 3) to use intellectual property law to help achieve human rights objectives); see also Mary W. S. Wong, *Toward an Alternative Normative Framework For Copyright: From Private Property to Human Rights*, 26 CARDOZO ARTS & ENT. L.J. 775 (2009) (advocating the use of a human rights framework as a way to accommodate both property rights and development interests, thereby achieving a better balance).

240. United Nations, *Universal Declaration of Human Rights*, G.A. res. 217A(III), U.N. Doc /810, art. 27 (1948). Art 27 States: (1) Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits. (2) Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

241. See, e.g., Peter S. Menell, *Intellectual Property: General Theories*, in *ENCYCLOPEDIA OF LAW AND ECONOMICS* 129 (Boudewijn Bouckaert & Gerrit De Geest eds., 2000) (giving an overview of the different theories on intellectual property). Thomas

kind of logic that has led to the development of policies that have prompted a fair amount of scholarly and public critique of the current intellectual property system.²⁴² However, instrumentalist intellectual property policy should not be weighted in favor of the protected information, person or group to the detriment of the public. This would be contrary to the goals of distributive justice.

Intellectual property rights can be described as the relationship between individuals in respect of their desire to control intangible goods or abstract objects.²⁴³ Can we find a way to minimize abuses in the dynamic of this relationship between commercial entities and individuals? This appears to be a significant element of the problem faced by traditional knowledge holders. The status quo seems to reflect a preference for the interests of commercial entities to the detriment of individual persons or communities. By re-characterizing the problem that needs to be addressed, effective alternative solutions can be developed.

Jefferson rejected a natural rights view on intellectual property and instead adopted a utilitarian approach. See Justin Hughes, *Copyright and Incomplete Historiographies: Of Piracy, Propertization, and Thomas Jefferson*, 79 S. CAL. L. REV. 993, 1030 (2006) (stating that Jefferson doubted “natural rights to property of any sort”).

242. See e.g., JAMES BOYLE, *SHAMANS, SOFTWARE AND SPLEENS* (1996); PETER DRAHOS & JOHN BRAITHWAITE, *INFORMATION FEUDALISM: WHO OWNS THE KNOWLEDGE ECONOMY?* (2003); LAWRENCE LESSIG, *THE FUTURE OF IDEAS*; MICHELE BOLDRIN & DAVID K. LEVINE, *AGAINST INTELLECTUAL MONOPOLY* (2008); MICHAEL PERELMAN, *STEAL THIS IDEA* (2002); Margot Kaminski, *The Origins and Potential Impact of the Anti-Counterfeiting Trade Agreement (ACTA)*, 34 YALE J. INT’L L. 247, 254–56 (2009) (criticizing the *Anti Counterfeiting Trade Agreement*); *India Plans Front to Nip New Piracy Law*, THE ECON. TIMES (May 29, 2010), available at <http://economictimes.indiatimes.com/articleshow/5986902.cms> (discussing India’s concerns over the effects of ACTA on exports of information technology and medicine as well as India’s efforts in getting other developing countries to unite together in opposition to ACTA); WTO, *Council Debates Anti-counterfeiting Talks, Patents on Life*, WTO News Items (June 9, 2010), available at http://www.wto.org/english/news_e/news10_e/trip_08jun10_e.htm (noting that China and India conducted lengthy statements against ACTA and how ACTA conflicts with the TRIPS Agreement); Monika Ermert, *Indian Official: ACTA Out of Sync With TRIPS and Public Health*, INTELL. PROP. WATCH (May 5, 2010), <http://www.ip-watch.org/weblog/2010/05/05/indian-official-acta-out-of-sync-with-trips-and-public-health/> (stating that ACTA will be hard on India due to juggling of competing public policy issues, IPR protection and public health.); Doug Palmer, *U.N. Urged to Probe U.S. Trade Stance on Generic Drugs*, REUTERS (Jul 20, 2010), <http://www.reuters.com/article/idUSTRE66J1CG20100720> (stating that AIDS groups are accusing the United States of “using the ‘Special 301’ report to pressure countries to give up certain public health rights they have under a World Trade Organization agreement on intellectual property rights known as TRIPS.”).

243. PETER DRAHOS, *A PHILOSOPHY OF INTELLECTUAL PROPERTY* 1, 5 (1996); SUSAN SCAFIDI, *WHO OWNS CULTURE?: APPROPRIATION AND AUTHENTICITY IN AMERICAN LAW* 159 (2005).

*B. Intellectual Property Related Solutions that Don't Require an
Expansion of the Existing Regime*

It may be inaccurate to assume that the general public and the local communities that develop traditional knowledge will be served by expanding the notion of intangible property. Indeed, intellectual property law can play only a small role in responding to the problems faced by local and indigenous communities. A legally binding international instrument that is based on an intellectual property model, while useful in achieving a global standard, is not the only solution. It is worth remembering that the adequate protection and enforcement of intellectual property rights, as required by TRIPS, has proven to be a challenge.²⁴⁴ A new traditional knowledge right would not help to relieve this burden. Furthermore, it would still need to be implemented, monitored and enforced in order to be effective.

Adjusting the current global intellectual property regime would be preferable to creating a *sui generis* intellectual property right in traditional knowledge. It may also be more effective in achieving a greater degree of fairness than creating a parallel intellectual property system. The protection of traditional knowledge is a complex problem for which there is no simple comprehensive solution. I suggest a multi-pronged approach, and offer some preliminary suggestions for alternatives that may be worthy of further consideration. This includes a discussion of some possibilities that may have already been raised at the WIPO or the WTO.

1. Accounting for Diverse Circumstances

A distributive justice approach to global intellectual property would shift the policy space from the focus on economic utilitarianism towards

244. Office of the U.S. Trade Representative, 2010 Special 301 Report 15 (2010) (noting that, despite the grace periods given for TRIPS implementation, many developing countries have yet to establish effective mechanisms for enforcing intellectual property rights while some are still finalizing legislation to implement their TRIPS obligations); WTO dispute resolution panels have been established to resolve various TRIPS disputes relating to its implementation or enforcement. *See, e.g.*, WTO, *China—Measures Affecting the Protection and Enforcement of Intellectual Property Rights* (Request for the Establishment of Panel by the United States) (2007); WTO, *European Communities—Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs* (Request for the Establishment of Panel by the United States) (2003); WTO, *European Communities – Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs*, (Request for the Establishment of Panel by Australia) (2003); WTO, *Canada—Term of Patent Protection*, (Report of the Appellate Body) (2000); WTO, *United States—Section 110(5) of the US Copyright Act*, (Report of the Panel) (2000); WTO, *India—Patent Protection for Pharmaceutical and Agricultural Chemical Products* (Complaint by the European Communities and their Member States) (1998).

addressing the imbalances in the intellectual property system so that it does not encroach on the rights of those who lack economic, political and informational resources. This may require developing measures to prevent the inappropriate use of traditional knowledge in obtaining intellectual property rights. As part of this, the regime should be refined so that sophisticated users of the global intellectual property system do not trample upon poor people's rights. This issue is being tackled in multiple fora and has been addressed to some extent in multilateral agreements such as the *CBD*, and the *International Treaty on Plant Genetic Resources for Food and Agriculture*.²⁴⁵ Further, various proposals are under consideration at the WTO TRIPS Council to address the matter of disclosure of genetic resources in patent applications.²⁴⁶

Paragraph 19 of the *Doha Declaration* directs the WTO TRIPS Council to consider the relationship between traditional knowledge and intellectual property.²⁴⁷ In addition, WTO members issued a *Doha Declaration on Public Health* in which they expressly agreed that the TRIPS agreement should be interpreted with sufficient flexibility to allow member States to address the health needs of their populations.²⁴⁸ A declaration on TRIPS and traditional knowledge would be consistent with the work mandated by paragraph 19 of the *Doha Declaration*. The statements therein could be aimed at increasing the likelihood of an interpretation of TRIPS that is consistent with the notion of respect for traditional knowledge.²⁴⁹

Additionally, WIPO could set guidelines to prevent the inappropriate exertion of intellectual property rights over traditional knowledge. The *Model Provisions on Folklore* contain some useful elements.²⁵⁰ For example, section 1 of the *Model Provisions* establishes

245. FAO Conference, Resolution 3/2001 (2001), available at <http://www.fao.org/Legal/TREATIES/033s-e.htm>. The United States has signed but not ratified the treaty.

246. See WTO, Article 27.3b, *Traditional Knowledge, Biodiversity*, available at http://www.wto.org/english/tratop_e/trips_e/art27_3b_e.htm; WIPO, *Submission by Australia, Canada, New Zealand, Norway and the United States of America*, 2 (2010) (proposing changes aimed at knowledge holder before relying upon that knowledge for use in an invention and ensuring that patents are not granted for inventions that are not novel or inventive).

247. WTO, *Ministerial Declaration*, WT/MIN(01)/DEC/1 (2001).

248. WTO, *Declaration on the TRIPS Agreement and Public Health*, WT/MIN(01)/DEC/2 (2001).

249. See Daniel Gervais, *Traditional Knowledge & Intellectual Property: A TRIPS Compatible Approach*, MICH. ST. L. REV. 137, 160-63 (2005) (proposing and outlining a draft declaration on traditional knowledge and trade).

250. WIPO IGC, MATTERS CONCERNING INTELLECTUAL PROPERTY AND GENETIC

that expressions of folklore shall be protected against “illicit exploitation” and other prejudicial actions as defined therein.²⁵¹ A traditional knowledge document could build upon such work. Illicit exploitation should be explicitly linked to commercial exploitation and limited to a clearly identifiable traditional or indigenous community. Also, the existence of a disparity in bargaining power between the knowledge source community and the intellectual property right holder or commercializing entity should be among the criteria required in order to establish illicit exploitation.

2. Mediation

The use of the WIPO Mediation and Arbitration Center as an option for resolving traditional knowledge-related disputes has been suggested and is worth exploring.²⁵² The WTO also has a dispute resolution mechanism that can be used for TRIPS-related disputes between WTO Member States.²⁵³ However, the WTO does not resolve disputes that are unrelated to State obligations under the WTO agreements, nor does it serve to resolve disputes between private parties. The WIPO Mediation and Arbitration Center, by comparison, was established for the purpose of resolving international disputes between private parties.²⁵⁴ It has been effectively used to resolve numerous domain name disputes.²⁵⁵

In light of the poor economic situation of many indigenous and traditional peoples, mediation and arbitration could be quite useful as a less costly alternative.²⁵⁶ In the context of alternative dispute resolution, existing soft law norms outside the intellectual property framework that encourage good corporate behavior could also be considered as a

RESOURCES, TRADITIONAL KNOWLEDGE AND FOLKLORE, WIPO Doc. WIPO/GRTKF/IC/1/3, 28 (2001) (describing the *Model Provisions* as a “*sui generis* model for intellectual property-type protection of traditional knowledge-related subject matter.”). Though I do not see an intellectual property model as the best option, there are some aspects of the Model provisions that could serve as a starting point.

251. UNESCO-WIPO, *Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions* (1985).

252. See WIPO IGC, POSITION PAPER OF THE ASIAN GROUP AND CHINA, WIPO Doc. WIPO/GRTKF/IC/2/10, 2 (2001).

253. TRIPS Agreement, *supra* note 6.

254. WIPO ARBITRATION AND MEDIATION CENTER, <http://www.wipo.int/amc/en/center/background.html>.

255. WIPO UDRP Domain Name Decisions (gTLD), *available at* <http://www.wipo.int/amc/en/domains/decisionsx/index.html>.

256. See Jacques de Werra, *Fighting Against Biopiracy: Does the Obligation to Disclose in Patent Applications Truly Help?*, 42 VAND. J. TRANSNAT'L L. 143, 174–78 (2009) (proposing the use of arbitration and mediation to resolve traditional knowledge cases).

resource.²⁵⁷ Any such process would have to be sensitive to the reality that in such disputes, one side could have significantly more financial or informational resources.²⁵⁸ It would be important to take this into account in order to adequately address the concerns of both the intellectual property right holder and the relevant traditional knowledge community.

3. Capacity Building

WIPO and the WTO could assist developing countries and indigenous peoples in documenting their traditional knowledge. India established a Traditional Knowledge Digital Library consisting of 200,000 traditional Indian medicine formulations and gave the European Patent Office access to the database for the purposes of patent searches and examinations.²⁵⁹ According to the Government of India, there have been more than 2,000 cases annually of misappropriation of Indian traditional medicinal knowledge since the time the WIPO IGC was established.²⁶⁰ Nonetheless, the documentation has been useful in enabling the Indian government to contest certain patents.²⁶¹ WIPO and the WTO already provide technical assistance to developing countries.²⁶² For those who cannot afford to collect the relevant traditional knowledge data and set up systems such as that developed by India, technical assistance could be provided through existing international mechanisms.

4. Education

WIPO should continue to promote further education on the use of the existing intellectual property system in order to assist traditional knowledge communities to prevent misappropriation.²⁶³ Although the

257. See, e.g., *The OECD Guidelines for Multinational Enterprises: Text, Commentary and Clarifications*, COMM. ON INT'L INV. AND MULTINATIONAL ENTER. (Oct. 31, 2001), available at <http://busa.org.za/docs/Guidelines.pdf>.

258. Some multinational corporations have revenues greater than the gross domestic product of entire countries. This may make it difficult for some countries to adequately represent their position. See FREDERICK M. ABBOTT ET AL., INTERNATIONAL INTELLECTUAL PROPERTY IN AN INTEGRATED WORLD ECONOMY 73–75 (2007).

259. WIPO IGC, REPORT ¶ 42, WIPO Doc. WIPO/GRTKF/IC/14/12 (2009).

260. *Id.*

261. For example, the patent related to turmeric.

262. TRIPS Agreement, *supra* note 6, at art. 67 (provision on technical cooperation); Convention Establishing the World Intellectual Property Organization art. 4(v) (amended 1979) (provision on technical cooperation).

263. Convention Establishing the World Intellectual Property Organization, art. 4(vi) provides that WIPO “shall assemble and disseminate information concerning the protection of intellectual property”

existing intellectual property regime may favor industrialized countries, it is important to acknowledge that some of the intangible property that may be described as traditional knowledge is protectable under the current law.

5. National Measures

Some countries have taken measures to explicitly protect their traditional knowledge and cultural property in the absence of an international agreement.²⁶⁴ This is an important step because, as sovereign states, national governments control access to their territories and resources. If biopiracy, for example, is a significant problem for a particular nation, then tighter national controls will have a greater effect than an international instrument to protect traditional knowledge as a new form of intangible property. Unfortunately, some governments may not be sufficiently resourced to exercise the necessary control. Further, the affected community may be a minority group whom the government does not effectively represent. This presents a variety of challenges that would have to be addressed at the national level and possibly with the assistance of the international community.

CONCLUSION

Classical intellectual property rights serve a public function in exchange for the time-limited private right that is granted by the state. Property rights in intangible goods must be justified because they effectively remove certain categories of knowledge products from the public sphere. As discussed, there is a risk of public harm, including an undue concentration of power, in creating excessively strong intellectual property rights. Likewise, there is a risk of harm if intellectual property law develops to include subject matter that would be better protected through the use of a less monopolistic means.

Certainly, the international intellectual property system needs to reflect competing values, which means it must recognize and respect other interests. As intellectual property minimum standards have

264. WIPO IGC, REPORT ¶ 20, WIPO Doc. WIPO/GRTKF/IC/14/12 (2009); WIPO IGC, *Comparative Summary of TCE Sui Generis Legislation*, Annex II, WIPO Doc. GRTKF/IC/9/INF/4; Copyright Act 2005, § 17 (Ghana) (providing perpetual protection for Ghanaian folklore); N.Z. Trade Marks Act, 2002, § 17 (prohibiting the registration of marks that are likely to offend a segment of the community, including the Maori); Law introducing a Protection Regime for the Collective Knowledge of Indigenous Peoples Derived from Biological Resources Law No. 27811, 2002 (Peru) (providing *sui generis* protection for indigenous knowledge); Special System for the Collective Property Rights of Indigenous Peoples Law No. 20, June 26, 2000 (Pan.).

become globally enforceable through TRIPS, it is essential to take into account divergent views, histories, and philosophies. The difficulty with TRIPS and the subsequent “TRIPS plus” agreements is that they may be seen as privileging Western ideologies and values.

Nonetheless, as the global community moves towards greater integration, it is counterproductive to develop what amounts to a “Western” intellectual property system alongside a “non-Western” intellectual property system. There appears to be little to no benefit in creating or reinforcing what appears to be a cultural divide in the protection of intangible goods.²⁶⁵ Moreover, developing countries and indigenous peoples may find that they face increased costs and reduced access to traditional knowledge goods. This may be especially true for goods that originate outside of their particular territories or communities. This outcome would be contrary to the equity-oriented values that appear to be an important element of traditional knowledge protection.

At the same time, a distributive justice approach to intellectual property law requires that the problems in the existing system be addressed. Many scholars have articulated the case for a more balanced intellectual property regime that makes room for competing values and interests. It is possible, and preferable, to address the underlying issues rather than to expand a system which has yet to be shown to be beneficial for every society. If the goal of access to affordable knowledge and information is a worthy one, then an assessment of traditional knowledge from a distributive justice perspective leads to the conclusion that a *sui generis* intangible property right in traditional knowledge may not be the most appropriate response to the problems of bio-piracy and misappropriation.

The corollary to this position is that the international community should be mindful of the need to balance rights and obligations in the development of international intellectual property law and policy. Unfortunately, the recent negotiations on the *Anti-Counterfeiting Trade Agreement* (“ACTA”) serve as yet another example of an expanding protectionist intellectual property model that predominantly favors industrialized countries’ interests.²⁶⁶ It should come as no surprise then

265. If one accepts the view that traditional knowledge represents intangible developing country goods while intellectual property represents intangible developed country goods, then from that standpoint, the cultural divide already exists. As I argue in this paper, however, this dichotomy is not accurate.

266. For the position of the Government of the United States, see <http://www.ustr.gov/acta>. For more critical perspectives, see Professor Michael Geist’s commentary at <http://www.michaelgeist.ca/content/view/4525/135/>. See also American

if developing countries push back on matters, like traditional knowledge, that are of concern to them. Developing countries may quite reasonably perceive the negotiations on *ACTA* as industrialized countries working together to strengthen protection for their intangible goods while ignoring the needs of the majority of the world. In light of their continued interest in improving global protection for intellectual property, any arguments put forth by industrialized countries to dispel the need for traditional knowledge protection may appear to be contradictory and self-serving. Regrettably, what seems to be absent is an instrumentalist analysis of the objectives of intellectual property policy. Ideally, this should include an assessment of the benefit to the global public that comprises the international community.